Boston College International and Comparative Law Review

Volume 31 | Issue 1 Article 2

12-1-2008

A Summary of Contradictions: An Outline of the EU's Main Internal and External Approaches to Ethnic Minority Protection

Dimitry Kochenov

A SUMMARY OF CONTRADICTIONS: AN OUTLINE OF THE EU'S MAIN INTERNAL AND EXTERNAL APPROACHES TO ETHNIC MINORITY PROTECTION

Dimitry Kochenov*

Liberty has always been understood in Europe as the freedom to be our real selves.

—José Ortega y Gasset[1]

Abstract: A number of available legal instruments have the potential to contribute to the elaboration of an EU minority protection standard. These instruments, however, are mostly limited to guaranteeing simple nondiscrimination, which is not enough to ensure minority protection *stricto sensu*. The lack of any viable internal minority protection standard did not prevent the European Union from treating minority protection as one of the key elements of the pre-accession process leading to the Eastern enlargement, reinforcing the internal-external competence divide and reducing the effectiveness of minority protection in the European Union. Although minority protection was one of the Copenhagen political criteria—and thus at the core of the conditionality principle presupposing a fair assessment of the candidate countries' progress on the merits—the Commission clearly used minority protection in a discriminatory way, tolerating the standard of assimilation in one group of candidate countries (Latvia, Estonia) and backing cultural autonomy in others. Thus, alongside the internal toleration or simple denial of minority problems in the European Union, the Commission simultaneously promoted two contradicting approaches in external relations: *de facto* assimilation, which is prohibited by article 5(2) of the Framework Convention for the Protection of National Minorities, and cultural autonomy, which brings to life a complicated web of partly overlapping, partly contradicting standards.

---

* Assistant Professor of European Law, Groningen Law School. European and Economic Law Department, Oude Kijk in 't Jatstraat 26, 9712EK Groningen, The Netherlands. +31 50 363 7486; +31 61 842 7031; +31 50 363 5603 (fax). I would like to thank Prof. Dr. Laurence W. Gormley, Prof. Dr. Christophe Hillion, Prof. Dr. Marc Maresceau, and Dr. Gabriel N. von Toggenburg, who read the drafts of this article at different stages of completion. All mistakes and omissions remain mine.

[1] José Ortega y Gasset, Toward a Philosophy of History 57 (1940).

Introduction: An Edifice of Many Contradictions

"Stubbornly thinking in symbols": this is how a Czech mayor, busy with building a Roma ghetto in the town of Ústí nad Labem, characterized the European Union (EU).[2] The mayor in question is not the only person in Central and Eastern Europe to ascribe equality, nondiscrimination, and human rights protection only a "symbolic" value. Luckily, the European integration project is largely built around a set of values quite different from the local prejudices found in Member States and candidate countries. Minority protection is one of those principles, vital for the successful creation of a Union based on democracy, the rule of law, and respect for human rights.

The articulation of the pre-accession principle of conditionality[3] during the preparation of the Eastern enlargement of the European Union[4] provided the organization with a number of tools of influence necessary to effectively alter the situation of minority protection in the candidate countries and other states willing to accede.[5] Such developments notwithstanding, the fact that the European Commission (Commission) has honored the minority protection criterion with unprecedented attention surprised a number of academics.[6]

---

[2] Edo Banach, *The Roma and the Native Americans: Encapsulated Communities Within Larger Constitutional Regimes*, 14 Fla. J. Int'l L. 353, 382 (2002).

[3] The essence of the principle of conditionality was to make the accession of the candidate countries to the European Union conditional on a number of preconditions spelled out by the Commission. An elaborate system of legal and political instruments was used to check the candidate countries' compliance with the preconditions formulated. *See* Dimitry Kochenov, EU Enlargement and the Failure of Conditionality: Pre-Accession Conditionality in the Fields of Democracy and the Rule of Law, Ch. 2 (2008).

[4] The fifth enlargement round accommodated Estonia, Latvia, Lithuania, Poland, Slovakia, Hungary, Slovenia, Malta, Cyprus, and the Czech Republic. *See* Treaty Concerning the Accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic to the European Union, 2003 O.J. (L 235) 17. The sixth enlargement round accommodated Romania and Bulgaria. *See* Treaty Concerning the Accession of the Republic of Bulgaria and Romania to the European Union, 2005 O.J. (L 157) 11.

[5] *See* Dimitry Kochenov, *EU Enlargement Law: History and Recent Developments: Treaty—Custom Concubinage?*, 9 Eur. Integration Online Papers 1, 28 n.2 (2005), http://eiop.or.at/eiop/index.php/eiop (providing an exhaustive list of such tools of influence). *See generally* EU Enlargement (Christophe Hillion ed., 2004) [hereinafter EU Enlargement]; Handbook on European Enlargement (Andrea Ott & Kirstyn Inglis eds., 2002).

[6] *See, e.g.,* Marc Maresceau, *The EU Pre-Accession Strategies: A Political and Legal Analysis*, *in* The EU's Enlargement and Mediterranean Strategies 3, 16 (Marc Maresceau & Erwan Lannon eds., 2001).

Academics were astonished because minority protection as such lies outside the scope of the *acquis communautaire*.[7] However, given a goal-oriented reading of articles 49 and 6(1) of the European Union Treaty (EU Treaty) in light of article 5 of the Treaty Establishing the European Community (EC Treaty), the Commission's activities during the pre-accession process were not constrained by article 5 of the EC Treaty's competence limitations because only checking the candidates' adherence to the "democracy, the Rule of Law and human rights"[8] issues falling within the scope of the *acquis* would contradict the very purpose of article 6(1) of the EU Treaty, which clearly has an overwhelming scope, not restricted by Community competence limitations. Thus it is not surprising that minority protection, along with other issues generally falling outside the scope of the *acquis,* became one of the corner-stones of the pre-accession. Ethnic minority protection is not the only example of such practice—the rights of sexual minorities, for instance, have been included by the Commission into the pre-accession assessment even though the *acquis* did not include any Community competence on this issue at the time when regular reporting had started[9] and the case law of the European Court of Justice (ECJ) was rather hostile to EU citizens belonging to sexual minorities.[10]

Judging by the reports and opinions released by the Commission during the preparation of the eastern enlargement, it can be concluded that minority protection was at the core of the pre-accession process. Sections of the Copenhagen-related documents[11] concerning the assessment of this criterion are considerably longer than the sections concerning other issues. The analysis contained therein covered a large number of minority protection issues. Reports concerning some countries even adopted a unique sub-structure of the minority protec-

---

[7] Christine Delcourt, *The* Acquis Communautaire*: Has the Concept Had Its Day?*, 38 COMMON MKT. L. REV. 829, 830 (2001) (noting that *acquis communautaire* includes whole body of legal instruments in force in European Union).

[8] Presidency Conclusions, Copenhagen European Council (June 21–22, 1993). For general information on the Copenhagen Criteria, see generally Christophe Hillion, *The Copenhagen Criteria and Their Progeny*, *in* EU ENLARGEMENT, *supra* note 5, at 1.

[9] *See, e.g.*, Written Question No. 2224/96, 1996 O.J. (C 365) 95; Written Question No. 2134/83, 1984 O.J. (C 152) 25; Written Question No. 2126/83, 1984 O.J. (C 173) 9.

[10] *See* Case C-249/96, Lisa Jacqueline Grant v. South-West Trains Ltd., 1998 E.C.R. I-621.

[11] *See generally* Dimitry Kochenov, *Behind the Copenhagen Façade: The Meaning and Structure of the Copenhagen Political Criterion of Democracy and the Rule of Law*, 8 EUR. INTEGRATION ONLINE PAPERS 5–8 (2004), http://eiop.or.at/eiop/index.php/eiop (describing structure of whole body of Copenhagen-related documents including those released in implementation of conditionality principle of Copenhagen criteria).

tion section, something the Commission did not do while addressing other issues.

Such an approach to minority protection can be regarded as a logical response to the rise of nationalism in Central and Eastern European countries, and is clearly connected with the European Union's stability and security concerns.[12] Although it has been argued that "nationalism is an inevitable factor in the creation of the post-communist state,"[13] not all scholars share this view.[14] At the same time, it is impossible to deny that historically, minority protection has always been especially acute for Central and Eastern European countries.[15] This was particularly true during the *interbellum* period between the two world wars, when the dissolution of several empires and the creation of new nation states shifted borders and gave rise to a number of minority problems all over the region.

The prominent role played by minority protection during the pre-accession process leading to the last enlargement did *not* result in (and was not based on) elaboration of any serious minority protection standard that the European Union could use both internally and externally, especially during the preparation of the coming enlargements. Such a standard will be needed in the future because the

---

[12] For discussion of the role played by the respect for and the protection of minorities in the Copenhagen criteria in the preparation of the fifth enlargement, see generally J.W. van der Meulen, Bescherming van minderheden als criterium bij EU-uitbreiding: de Europese Commissie en Midden-Europa (2003) Kristen Henrard, *The Impact of the Enlargement Process on the Development of a Minority Protection Policy Within the EU: Another Aspect of Responsibility/Burden-Sharing?*, 9 Maastricht J. Eur. & Comp. L. 357 (2002); Christophe Hillion, *Enlargement of the EU—The Discrepancy Between Membership Obligations and Accession Conditions as Regards the Protection of Minorities*, 27 Fordham Int'l L.J. 715 (2004); Gwendolyn Sasse, *Minority Rights and EU Enlargement: Normative Overstretch of Effective Conditionality?*, *in* Minority Protection and the Enlarged European Union (Gabriel von Toggenburg ed., 2004) [hereinafter Enlarged European Union]; James Hughes & Gwendolyn Sasse, *Monitoring the Monitors: EU Enlargement Conditionality and Minority Protection in the CEECs*, 1 J. Ethnopolitics & Minority Issues in Eur. (2003), http://ecmi.de/jemie/download/Focus1-2003_Hughes_Sasse.pdf; Peter Vermeersch, *EU Enlargement and Minority Rights Policies in Central Europe: Explaining Policy Shifts in the Czech Republic, Hungary and Poland*, 1 J. Ethnopolitics & Minority Issues in Eur. (2003), http://ecmi.de/jemie/download/Focus1-2003_Vermeersch.pdf; Antje Wiener & Guido Schwellnus, *Contested Norms in the Process of EU Enlargement: Non-Discrimination and Minority Rights* (Const. Web Papers, No. 2, 2004), http://les1.man.ac.uk/conweb.

[13] András Sajó, *Protecting Nation States and National Minorities: A Modest Case for Nationalism in Eastern Europe*, 1993 U. Chi. L. Sch. Roundtable 53, 53 (1993).

[14] *See generally* Rein Mullerson, *Minorities in Eastern Europe and the Former USSR: Problems, Tendencies and Protection*, 56 Mod. L. Rev. 793 (1993).

[15] Petra Roter, *Locating the "Minority Problem" in Europe: A Historical Perspective*, 4 J. Int'l Rel. & Dev. 221, 221 (2001).

enlargement saga is far from over. In 2007, the European Union embraced two new Member States (Bulgaria and Romania) and more will join in the future. Three countries currently enjoy a candidate country status: Croatia; Macedonia (FYROM); and Turkey.[16] Moreover, a number of countries in Europe, including Albania, Armenia, Bosnia and Herzegovina, Georgia, Montenegro, Moldova, Serbia, and Ukraine, made it clear that joining the European Union is among their foreign policy priorities. In other words, the European Union stands somewhere in the middle of its enlargement road. In the future, enlargements are likely to stay on the EU agenda for several decades. It goes without saying that all countries in question, and especially Turkey with its treatment of the Kurdish minority,[17] and the Balkan states recovering from violent ethnic conflicts, have a number of outstanding minority issues.[18] The European Union will have to address these issues during the pre-accession process. To effectively do so, a reliable minority protection standard is required.

As analysis of the application of the conditionality principle demonstrates, the European Union employed at least two mutually exclusive standards during the pre-accession process. The first was roughly built on the idea of tolerating (forced) assimilation (in Estonia and Latvia). The second was based on the idea of cultural autonomy (applied in other countries and, in particular, in Romania, Slovakia and Bulgaria).[19] This process, although reflecting the state of normative disarray of internal EU minority protection, is ill-suited both for the conduct of future enlargements and, more importantly, for the effective protection of minorities within the European Union. Some difficult choices will have to be made in the near future to change this situation.

This Article illustrates two main clashes inherent in EU minority protection. First, building *inter alia* on the works of Hillion,[20] Hughes

---

[16] Eur. Comm'n, Candidate Countries, http://ec.europa.eu/enlargement/countries/index_en.htm (last visited Jan. 17, 2008). Two of these countries, Croatia and Turkey, have already started accession negotiations. Both started negotiating on October 3, 2005. *See* EU-Croatia Relations, http://ec.europa.eu/enlargement/countries/index_en.htm (last visited Jan. 31, 2008); EU-Turkey Relations, http://ec.europa.eu/enlargement/turkey/eu_turkey_relations_en.htm (last visited Jan. 17, 2008); *see also* EU-Turkey Negotiating Framework, *available at* http://ec.europa.eu/enlargement/pdf/turkey/st20002_05_tr_ framdoc_en.pdf.

[17] *See* Dogu Ergil, *The Kurdish Question in Turkey*, 11 J. Dem. 122, 130–35 (2000).

[18] The former Yugoslav republics have only recently turned to a balanced approach on minority issues. *See generally* Antonija Petričušić, *Constitutional Law on the Rights of National Minorities in the Republic of Croatia*, 2 Eur. Y.B. Minority Issues 607 (2003).

[19] *See infra* Section V.

[20] Hillion, *supra* note 12, at 714–40.

and Sasse,[21] and Wiener and Schwellnus,[22] it discusses the internal-external divide in EU minority protection, which allows for the promotion of minority protection outside EU borders while tolerating the neglect of minority issues within. Second, through the use of several examples, this Article demonstrates that a double standard of minority protection arose from external minority protection activity of the European Union during preparation for the fifth and sixth enlargements. These contradictory practices are put into the broader context of available minority protection standards.

The whole edifice of EU minority protection that miraculously stands today is thus built on two contradictions and is unable to serve its main function—namely, to provide effective protection for minorities in the European Union.

I. Structure of the Argument

After briefly discussing the theoretical debate surrounding the very idea of minority protection (focusing on Kymlicka and Waldron), this Article first makes a clear distinction between the nondiscrimination approach taken by the Community and best articulated in the Race Directive,[23] and a fully fledged vision of minority protection as understood in the Permanent Court of International Justice's (PJIC) *Minority Schools in Albania* case[24] that also includes special minority protection measures not limited to simple nondiscrimination. It then summarizes some legal provisions that could potentially enable the European Union to espouse a fully-fledged approach to minority protection. Second, this Article briefly focuses on the internal-external minority protection divide in the European Union, providing a summary of minority protection measures promoted by the European Union externally and constituting part of EU enlargement law. This Article also discusses the rare internal references to minority protection, which mostly come from political documents lying outside the normative

---

[21] Hughes & Sasse, *supra* note 12, at 1–30.

[22] Wiener & Schwellnus, *supra* note 12, at 1–39.

[23] Council Directive 2000/43/EC, 2000 O.J. (L 180) 22 [hereinafter Race Directive].

[24] *See* Minority Schools in Albania, 1935 P.C.I.J. (ser. A./B.) No. 64 (Apr. 6, 1935). In this case, involving Greek minority schools in Albania, the Court established that formal equality was not enough to guarantee equal rights for the Greek minority residing in Albania and special rights were needed. *See id.* The Court found that "there would be no true equality between a majority and a minority if the latter were deprived of its own institutions and were consequently compelled to renounce that which constitutes the very essence of being a minority. *Id.*

framework of EU law. The paradoxical difference between what the European Union itself adhered to and what it promoted is illustrated by one of Joseph Wieler's maxims: "do not do what I do, do what I tell you to do"[25] (initially ascribed to "officers" but equally applicable to the European Union's policy line in the field of minority protection). Third, this Article focuses on EU minority protection standards during the fifth and the sixth enlargement rounds and connects the inadequacy of the European Union's internal approach to minority protection with the inadequacy of the external one. To do so, the Article looks into the substance and structure of the Copenhagen-related documents released during the preparation of the Eastern enlargement with a view to discovering a standard the European Union used while applying the conditionality principle in this field.

Finally, having discovered at least two of such standards, the Article focuses on the inadequacy of the whole approach to minority protection taken by the European Union.

II. Should the European Union Build Disneylands? Waldron vs. Kymlicka

It has been suggested that liberal democracies should take a neutral stance *vis-à-vis* ethnocultural diversity and that equality alone, without specific minority protection rights, can meet the needs of minorities.[26] Moreover, the negative effects of minority protection are clear, demonstrating the human need to belong to a distinct community,[27] which in the past was taken for granted.[28] Thus, the very core of arguments promoting specific rights for minorities has been seriously questioned. Jeremy Waldron opined that:

> [I]mmersion in the traditions of a particular community in the modern world is like living in a Disneyland and thinking that one's surroundings epitomize what it is for a culture really to exist. Worse still, it is like demanding funds to live in a Disneyland and the protection of modern society for the boundaries

---

[25] J.H.H. Weiler & Sybilla C. Fries, *A Human Rights Policy for the European Community and Union: The Question of Competences* (Jean Monnet Working Paper 4/99, 1999), *available at* http://www.jeanmonnetprogram.org/papers/papers99.html.

[26] *See, e.g.*, Brian Barry, Culture & Equality 317–28 (2001); Juha Räikkä, *Is a Membership—Blind Model of Justice False by Definition?*, *in* Do We Need Minority Rights? 3, 3–19 (Juha Räikkä ed., 1996).

[27] Jeremy Waldron, *Minority Cultures and the Cosmopolitan Alternative*, 25 U. Mich. J.L. Reform 751, 756 (1992).

[28] *Id.* at 759.

> of Disneyland, while still managing to convince oneself that what happens inside Disneyland is all there is to an adequate and fulfilling life.[29]

Will Kymlicka provides a drastically different approach. His argument is built around an absolute necessity to have specific minority instruments, based on the assumption that no polity can be truly ethnically neutral.[30] This approach coincides with that of the League of Nations.[31]

The lack of scholarly consensus on this issue is telling. A number of different practical approaches to minority protection adopted by EU Member States reflect the diversity of theories in the area. This diversity becomes even more striking during enlargement preparation.[32]

Compared to Waldron and Kymlicka's theories, the European Union is somewhere in the middle.[33] Although it does not provide a fully-fledged minority protection mechanism, it does not exclude the possibility of institutionalizing minority protection and even recognizes it. Community Law in the sphere of minority protection might not be well-articulated, but it is certainly far from being "non-existent," as Hughes and Sasse argue.[34]

---

[29] *Id.* at 763.

[30] *See* WILL KYMLICKA, LIBERALISM, COMMUNITY, AND CULTURE 1–5 (1989). *But see* Marlies Galenkamp, *Speciale rechten voor minderheden? Een commentaar op Kymlicka's* Multicultural Citizenship, 22 RECHT EN KRITIEK 202, 215, 217–23 (1996); Waldron, *supra* note 27, at 781–88.

[31] *See* GAETANO PENTASSUGLIA, MINORITIES IN INTERNATIONAL LAW 27–29 (2002) [hereinafter MINORITIES IN INTERNATIONAL LAW].

[32] *See* NORBERT ROULAND ET AL., DROIT DES MINORITES ET DES PEUPLES AUTOCHTONES 261–305 (2006); Roberto Toniatti, *Minorities and Protected Minorities: Constitutional Models Compared*, *in* CITIZENSHIP AND RIGHTS IN MULTICULTURAL SOCIETIES 195, 205–12 (Michael Dunne & Tiziano Bonazzi eds., 1995).

[33] On the main aspects of minority protection in the EU legal context, see generally NIAMH NIC SCHUIBHNE, EC LAW AND MINORITY LANGUAGE POLICY (2003); Maria Amor Martín Estébanez, *The Protection of National or Ethnic, Religious and Linguistic Minorities*, *in* THE EUROPEAN UNION AND HUMAN RIGHTS 133 (Nanette Neuwahl & Allan Rosas eds., 1995); Niamh Nic Schuibhne, *The EU and Minority Language Rights*, 3 INT'L J. MULTICULTURAL SOC'YS 61 (2001); Bruno de Witte, *Politics versus Law in the EU's Approach to Ethnic Minorities*, *in* EUROPE UNBOUND 137 (Jan Zielonka ed., 2002) [hereinafter *Politics v. Law*]; Martin Brusis, *The EU and Interethnic Power-Sharing Arrangements in Accession Countries,* 1 J. ETHNOPOLITICS & MINORITY ISSUES IN EUR. (2003), http://ecmi.de/jemie/download/Focus1-2003_Brusis.pdf; Gabriel von Toggenburg, *A Rough Orientation Through a Delicate Relationship: The European Union's Endeavours for (its) Minorities*, 4 EUR. INTEGRATION ONLINE PAPERS (2000), http://eiop.or.at/eiop/index.php/eiop [hereinafter *Rough Orientation*].

[34] Hughes & Sasse, *supra* note 12, at 2.

III. Nondiscrimination, Special Rights and Albanian Schools

International law has long recognized minority protection.[35] According to an established practice,[36] articulated by the PCIJ in the Advisory Opinion concerning minority schools in Albania,[37] minority protection consists of two main components: non discrimination on the one hand and special measures for minority protection on the other.[38] Although these elements are certainly interconnected, their essence remains different.

In Europe, the Council of Europe (CoE) has been especially successful in dealing with these components, which play an important role in minority protection. The CoE legal system makes a rather successful attempt to combine both of them through the use of the Framework Convention for the Protection of National Minorities (Framework Convention)[39] and the European Charter for Regional and Minority Languages,[40] coupled with the nondiscrimination provisions of the European Convention on Human Rights (ECHR).[41] Next to ECHR article 14, which has acquired new importance after the entry into force of Protocol 12 to the ECHR (making the self-standing use of the article

---

[35] For recognition of minority protection by the United Nations, see International Covenant on Civil and Political Rights arts. 26–27, Dec. 19, 1966, 999 U.N.T.S. 171, *available at* http://www2.ohchr.org/english/law/ccpr.htm; International Convention on the Elimination of all Forms of Racial Discrimination, Dec. 21, 1965, 660 U.N.T.S. 195 art. 1.1, *available at* http://www2.ohchr.org/english/law/cerd.htm (clarifying the meaning of the term "racial discrimination"). For recognition of minority protection in international law, see generally Athenasia Spiliopoulou Åkermark, Justifications for Minority Protection in International Law (1997); Kristin Henrard, Devising an Adequate System of Minority Protection (2000); Minorities in International Law, *supra* note 31 Gaetano Pentassuglia, Defining "Minority" in International Law (2000) [hereinafter Defining "Minority"]; Gaetano Pentassuglia, *On Models of Minority Rights Supervision in Europe and How They Affect a Changing Concept of Sovereignty*, 1 Eur. Y.B. Minority Issues 29 (2001); Isabelle Schulte-Tenckhoff & Tatjana Ansbach, *Les minorités en droit intrenational*, *in* Le droits et les minorites 15 (Alain Fenet et al. eds., 1995).

[36] *See* U.N. Econ. & Soc. Council [ECOSOC], Sub-Comm. on Prevention of Discrimination & Prot. of Minorities, *Report Submitted to the Commission on Human Rights*, § 5, U.N. Doc. E/CN.4/52 (Dec. 6, 1947) (*prepared by* Joseph Nisot).

[37] *Minority Schools in Albania*, 1935 P.C.I.J. at 17.

[38] Henrard, *supra* note 12, at 59; *see also* Will Kymlicka, *Introduction* to The Rights of Minority Cultures 1–29 (Will Kymlicka ed. 1995) (defending this position).

[39] Framework Convention for the Protection of National Minorities, Feb. 1, 1995, Europ. T.S. No. 157 [hereinafter Framework Convention].

[40] European Charter for Regional and Minority Languages, Nov. 5, 1992, Europ. T.S. No. 148.

[41] Convention for the Protection of Human Rights and Fundamental Freedoms art. 14, Dec. 10, 1950, Europ. T.S. No. 5.

possible),[42] and the case law of the European Court of Human Rights (Eur. Ct. H.R.),[43] the Framework Convention and the Charter form the most developed international minority protection system to date, combining binding and nonbinding legal documents aiming at the creation of a well-regulated minority protection regime in Europe.

It is necessary to keep in mind, however, that simply focusing on equality without providing minorities with specific group rights is another approach consistent with the notion of democracy.[44] In other words, the two-tier system of minority protection is desirable to protect fully the interests of the minorities, but there is no obligation in international law to institute such a system.

A. *The European Union and the Nondiscrimination Part of the Standard*

European Union law as it stands to date clearly gives an overwhelming priority to the nondiscrimination part of minority protection. This being said, it would be unfair to argue that this approach is a consequence of a particular doctrinal choice made by the Community. Unlike some of its Member States, such as France,[45] the European Union has not defied the PCIJ's position, but is simply not 'mature' enough in this respect to go further than Waldron's nondiscrimination minimum. The first component of minority protection (*i.e.* nondiscrimination based on belonging to a minority) is incorporated into the Community legal order via the Race Directive[46] based on article 13 of the EC Treaty and article 6(2) of the EU Treaty, in which reference to the ECHR is made, thus making a connection between article 14 of the ECHR and the principles of Community Law. Article 2 of the Directive states that "there shall be no direct or indirect discrimination based on racial or ethnic origin." Article 14 of the ECHR prohibits discrimination on the grounds of "sex, race, colour, language, religion, political or

---

[42] Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 2000, Europ. T.S. No. 177.

[43] *See generally* Geoff Gilbert, *The Burgeoning Minority Rights Jurisprudence of the European Court of Human Rights*, 24 Hum. Rts. Q. 736 (2002) (examining jurisprudence of European Court of Human Rights as it relates to minority groups).

[44] Nathan Glazer, *Individual Rights Against Group Rights*, *in* The Rights of Minority Cultures, *supra* note 38, at 123, 133; *see also* Waldron, *supra* note 27, at 752–57 (defending position similar to that of Glazer).

[45] *See* CC decision no. 99–412DC, June 15, 1999, *available at* http://www.conseilconstitutionnel.fr/decision/1999/99412/99412dc.htm (determining that group rights are unconstitutional in France); *see also* Frank Hoffmeister, *Monitoring Minority Rights in the Enlarged European Union*, *in* Enlarged European Union, *supra* note 12, at 85, 89–90.

[46] Race Directive, *supra* note 23, arts. 1–4.

other opinion, national or social origin, association with a national minority, property, birth or other status."

Read together, these provisions make it clear that nondiscrimination on the grounds of national origin or association with a national minority is elevated to one of the principles of Community Law.[47] This legal framework is reinforced by article 21(1) of the Charter of the Fundamental Rights of the European Union (CFR).[48] Article 21(1) of the CFR, which is based on the set of legal instruments outlined above, namely articles 14 of the ECHR, 6(2) of the EU Treaty, and 13 of the EC Treaty, reads as follows:[49]

> Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.[50]

Although the CFR is a "proclaimed" document having no binding force, its potential is illustrated by the references to its provisions made both by the ECJ[51] and the Court of the First Instance (CFI).[52] In other words, although not binding,[53] the CFR plays a role in the Community legal system.[54]

---

[47] *See* Hillion, *supra* note 12, at 718–21.

[48] *See* Charter of Fundamental Rights of the European Union, 2000 O.J. (C 364) 13.

[49] Council of the Eur. Union, Charter of Fundamental Rights of the EU: Explanations Relating to the Complete Text of the Charter 1, 39 (2000) [hereinafter Explanation of Charter of Fundamental Rights].

[50] S*ee generally* Guido Schwellnus, *"Much Ado About Nothing?" Minority Protection and the EU Charter of the Fundamental Rights* (Const. Web Papers, No. 5, 2001), http://les1.man.ac.uk/conweb (Follow the "archive" hyperlink; then follow the "2001" hyperlink) (describing effects of provision on minority protection in European Union).

[51] Case C-540/03, European Parliament v. Council of the European Union, 2006 E.C.R. I-5769, ¶ 83.

[52] *See* Case T-177/01, Jégo-Quéré et Cie SA v. Comm'n, 2002 E.C.R. II-2365, ¶¶ 1, 42.

[53] Generally not of legally binding nature, the Charter, which was published as an inter-institutional agreement, binds Community Institutions. Jacqueline Dutheil de la Rochére, *Driots de l'homme La Charte des driots fondamentaux et au-delá* (Jean Monnet Working Paper 10, 2001), *available at* http://www.jeanmonnetprogram.org/papers/papers01.html. For an interesting perspective on the solemn proclamation, see Koen Lenaerts & Eddy de Smijter, *A "Bill of Rights" or the European Union*, 38 Common Mkt. L. Rev. 273, 298, 299 (2001) (comparing solemn proclamation to insertion into Treaties).

[54] *See* Cases C-122/99 & C-125/99, D. & Kingdom of Sweden v. Council, 2001 E.C.R. I-4319, ¶ 97 (using reference to CFR to justify reluctance to protect human rights); *see also* Allard Knook, *The Court, The Charter, and the Vertical Division of Powers in the European Union*, 42 Common Mkt. L. Rev. 367, § 2.4 (2005) (arguing that rationale behind drafting of Charter was actually to limit human rights reach of ECJ).

Thus, a number of provisions lay down the basis for, and are able to influence further development of, the principle of nondiscrimination on the ground of belonging to a national minority in Community Law. These provisions include articles 6(2) of the EU Treaty, 13 of the EC Treaty, 14 of the ECHR, and 21(1) of the CFR as well as Directive 2000/43/EC.

B. *The European Union and the Special Rights Part of the Standard*

The principle of nondiscrimination as included in article 14 of the ECHR, around which the Community approach discussed above[55] is built, is narrower in scope than the Copenhagen criterion of "respect for and protection of minorities" because it does not include the second component of minority protection in light of the PCIJ's *Albanian Schools* decision. The European Commission on Human Rights established that "[ECHR] does not compel states to provide for positive discrimination in favour of minorities."[56] It is just another argument denoting that a simple anti-discrimination approach rooted in article 14 of the ECHR hardly includes a possibility to adopt specific measures aimed at improvement of the situation in the sphere of minority protection. In other words, it does not "reach out to minority rights *stricto sensu*."[57] Even the ECJ's active approach in several cases involving minorities, where the court viewed nondiscrimination as allowing for positive measures of minority protection,[58] stating *inter alia* that "protection of a [linguistic minority] may constitute a legitimate aim"[59] of state policy, did not change the general picture: the court is yet to establish national minority protection in a sense broader than simple nondiscrimination as a principle of Community Law.[60]

---

[55] *See supra* Section III.A.

[56] Silvius Magnago & Südtiroler Volkspartei v. Italy, 1996 Y.B. Eur. Conv. on H.R. 117, 120–21 (Eur. Comm'n H.R.). The Commission found that the minimal threshold introduced in the context of parliamentary elections does not constitute discrimination against minority parties. *See id.*

[57] *See* Minorities in International Law, *supra* note 31, at 125–26.

[58] Case C-281/98, Angonese v. Cassa di Risparmio di Bolzano SpA, 2000 E.C.R. I–4139 ¶ 42; Case C-379/87, Groener v. Minister for Educ., 1989 E.C.R. 3967, ¶ 24. The ECJ has also upheld complex affirmative action policies to combat discrimination. *See, e.g.,* Case C-409/95, Hellmut Marschall v. Land Nordrhein-Westfalen, 1997 E.C.R. I–6363; *see also* Louis Charpentier, *The European Court of Justice and the Rhetoric of Affirmative Action*, 4 Eur. L.J. 167 (1998). *But see* Case C-450/93, Eckhard Kalanke v. Freie Hansestadt Bremen, 1995 E.C.R I–3051.

[59] Case C-274/96, Criminal Proceedings Against Bickel and Franz, 1998 E.C.R. I-07637, ¶ 29.

[60] *See Rough Orientation*, *supra* note 33, at 19.

One can outline a number of possibilities to include the second element of minority protection into the ambit of Community Law.[61] Probably the most realistic is related to the use of the provisions of the EC Treaty dealing with culture.[62] It has been argued that Title XII of the EC Treaty clearly implies that none of the Member States is culturally homogeneous,[63] as article 151(1) of the EC Treaty states that "the Community shall contribute to the flowering of the cultures of the Member States, while respecting their national and regional diversity." The Community is also obliged to "take cultural aspects into account in its action . . . in order to promote the diversity of cultures."[64]

Article 22 of the CFR also contains a reference to diversity, inspired by articles 151(1) and (4) of the EC Treaty. It includes cultural, religious and linguistic diversity, thus indirectly referring to the respect for minority rights. It is notable that the drafters of the CFR viewed article 22 as being rooted in article 6 of the EU Treaty,[65] thus denoting that diversity is a constitutional principle of the European Union.[66]

The EC Treaty not only requires the Community to "take cultural aspects into account in its action,"[67] but also creates a climate "to promote culture"[68] through establishing that aid in this domain is "considered to be compatible with the common market."[69]

Certain minority protection measures in the cultural sphere were in place even during the pre-Maastricht period.[70] One such measure

---

[61] *See generally* Bruno de Witte, *The Constitutional Resources for an EU Minority Protection Policy, in* ENLARGED EUROPEAN UNION, *supra* note 12, at 107, 118–23.

[62] *See* Bruno de Witte, *The Cultural Dimension of Community Law, in* IV-I COLLECTED COURSES OF THE ACADEMY OF EUROPEAN LAW 229, 291 (1993); Maria Amor Martín Estébanez, *Minority Protection and the Organisation for Security and Co-operation in Europe, in* MINORITY RIGHTS IN THE 'NEW' EUROPE 31, 34 (Peter Cumper & Steven Wheatley eds., 1999) [hereinafter MINORITY RIGHTS IN THE 'NEW' EUROPE]; *Rough Orientation*, *supra* note 33, at 11; Schwellnus, *supra* note 50, at 20.

[63] Adam Biscoe, *The European Union and Minority Nations, in* MINORITY RIGHTS IN THE 'NEW' EUROPE, *supra* note 62, at 93.

[64] Treaty Establishing the European Community, 2006 O.J. (C 321E) 37, art. 151(4) [hereinafter EC Treaty].

[65] *See* EXPLANATION OF CHARTER OF FUNDAMENTAL RIGHTS, *supra* note 49, at 40. Declaration Number 11 to the Final Act of the Treaty of Amsterdam on the status of churches and non-confessional organizations is also mentioned among the provisions on which article 22 of the CFR was based. *See id.; see also* Draft Charter of Fundamental Rights of the European Union, CHARTE 4473/00, Oct. 11, 2000 (providing the explanatory notes of the praesidium).

[66] *See Rough Orientation*, *supra* note 33, at 7 & n.50.

[67] EC Treaty, *supra* note 64, art. 151(4).

[68] *Id.* art. 87(3)(d).

[69] *Id.* art. 87(3).

[70] *See Rough Orientation*, *supra* note 33, at 12.

was Directive 77/486 of July 1977,[71] concerning the education of migrant workers' children—nationals of one of the Member States—in their mother tongue. It is questionable, however, whether this directive is really a minority protection tool because it is inspired by the economic free movement and does not protect the rights of migrant workers belonging to the national minorities.[72] Although the classical approach to minority rights usually does not deal with the European citizens residing in a Member State other than their own, new studies adopt a somewhat more inclusive approach. Bruno de Witte was among the first scholars to ask the question "have the Member States of the EU become 'national minorities?'"[73]

A certain evolution is apparent from ECJ case law related to culture, which is particularly acute for minority protection. Martín Estébanez stresses the shift in the court's reasoning from mainly relying on economic considerations to more cultural ones.[74] Paying due respect to cultural rights, it is clear, however, that the court's main case law concerning the elaboration of minority protection rights at the Community level is mostly related to nondiscrimination,[75] which, as stated above, stops short of providing fully-fledged minority protection.

At present, the second component of the *Albanian Schools* minority protection standard is missing from Community Law. This situation does not prevent some scholars from being optimistic about the development of internal minority protection system within the European Union: "there seem to be already quite a number of building blocks in place on the basis of which a more explicit internal minority policy for the European Union could be developed if the necessary political will

---

[71] Council Directive 77/486, On the Education of Children of Migrant Workers, 1977 O.J. (L199) 32 (EC).

[72] "Economic free movement" is the freedom granted by article 39 of the EC Treaty to workers and their family members to reside and work anywhere in the Community on the basis of Community Law, not the law of the Member State of residence. It contrasted with "non-economic free movement" of other categories of European citizens (guaranteed by article 18 of the EC Treaty) which is much more restricted.

[73] *Politics v. Law*, *supra* note 33, at 148; *see* Gabriel von Toggenburg, *Minorities (…) The EU: Is the Missing Link an "Of" or a "Within"?*, 25 Eur. Integration 273, 275–76 (2003). *See generally* Gabriel von Toggenburg, *A Remaining Share or a New Part? The Union's Role vis-à-vis Minorities After the Enlargement Decade* (Eur. Univ. Inst., Working Paper No. 15, 2006), *available at* http://cadmus.iue.it/dspace/index.jsp (Follow the "Date" hyperlink; then select "2006") (addressing minority protection in different contexts) [hereinafter *The Union's Role*].

[74] *See* Martín Estébanez, *supra* note 33, at 144, nn.32–33.

[75] *See generally Angonese*, 2000 E.C.R. I-4139; *Bickel & Franz*, 1998 E.C.R. I-07637; *Groener*, 1989 E.C.R. 3967.

could be engendered."[76] The scope of internal EU protection of minorities is thus comparable to the nondiscrimination part of the CoE standard, but is slightly wider than that due to its expansion potential to cover special rights.

IV. Internal and External Aspects of Community Action: A Minority Rights Paradox

In light of the wording of article 6(1) of the EU Treaty, which does not explicitly include minority protection, the Copenhagen criterion dealing with respect for and protection of minorities has been called a "criterion which was not elevated to the nobility of Primary Law."[77] The observations related to the possible reasons why this has happened in such a way are numerous. It is clear that consensus concerning minority protection, as well as the political will to put such a system in place at the EU level is missing among Member States. This is illustrated by the problems related to the drafting and ratification of the CoE Framework Convention[78] and the declarations adopted by EU Member States during this process. According to Bruno de Witte, "[T]he notions of *ethnic minority* and *European Union* seem, at the first sight, to belong to two different worlds."[79]

A. *European Union External Dimension of Minority Protection*

Looking closer, however, it is clear that "the respect for and protection of minorities" has definitely become a new principle of EU enlargement law, marking a long process of minority-related developments in the context of several enlargements.

Certain rules aimed at the protection of the local communities first appeared in the context of the first enlargement with a reference to the rights of Channel Islanders, Manxmen,[80] and the residents of the Færœ

---

[76] *See* Martín Estébanez, *supra* note 33, at 162.

[77] *Rough Orientation*, *supra* note 33, § 4.3.

[78] Framework Convention, *supra* note 39. Basically, as a result of disagreements between the contracting parties at the drafting stage, the Framework Convention can hardly be characterized as an effectively binding document. Charles F. Furtado Jr., *Guess Who's Coming to Dinner? Protection for National Minorities in Eastern and Central Europe Under the Council of Europe*, 34 Colum. Hum. Rgts. L.R. 333, 355–65 (2003).

[79] *Politics v. Law*, *supra* note 33, at 137.

[80] Protocol No.3 on the Channel Islands and the Isle of Man to the Act concerning the Accession to the European Communities of the Kingdom of Denmark, Ireland, the Kingdom of Norway, and the Kingdom of Great Britain and Northern Ireland art. 2, 1972 O.J. (L73) 164 [hereinafter Protocol No. 3]; *see* K.R. Simmonds, *The British Islands and the Community: III—Guernsey*, 8 Common Mkt. L. Rev. 475, 480–82 (1971); K.R. Simmonds, *The*

Islands.[81] Such measures, not being minority protection *per se*, mostly limited the application of Community Law to these territories, with a goal of preserving local communities. In other words, they constituted a sort of "economic" minority protection, which was perfectly in line with the purely economic orientation of the Communities at that time.

At present, such minority protection measures can only be regarded with caution. Although they protect minorities, they also practically deprive the individuals belonging to the minorities of the part of Community Law rights they would otherwise enjoy by limiting the application of EU law to the inhabitants of these special areas. In one example, although the families granted settlement rights on Sark, the feudal fief in the hands of the seigneur of Sark and part of the bailiwick of Guernsey,[82] were British citizens,[83] they were not regarded as fully-fledged EU citizens because Community Law provisions relating to the free movement of workers and the free movement of services did not apply to them.[84] Although some of these people see this as a blessing, others are annoyed by this *de facto* discrimination and the inability to rely on the free movement of persons and services under EC law.[85] To become fully-fledged EU citizens, the Sarkese, just as any other Channel Islanders or Manxmen, must reside in the United Kingdom for five years.[86]

The *de facto* discrimination in terms of free movement rights is even more acute given that the Channel Islanders as well as Manxmen fall within the scope of British nationality, as defined for purposes of

---

British Islands and the Community: II—The Isle of Man, 7 COMMON MKT. L. REV. 454, 462–63 (1970); K.R. Simmonds, *The British Islands and the Community: I—Jersey*, 6 COMMON MKT. L. REV. 156, 167–69 (1969) [hereinafter *Jersey*].

[81] Protocol No. 2 on the Faroe Islands, Documents Concerning the Accession to the European Communities of the Kingdom of Denmark, Ireland, the Kingdom of Norway and the United Kingdom of Great Britain and Northern Ireland, 1972 O.J. (L 73) 163 art. 1; *Jersey*, *supra* note 80, at 161.

[82] *See* E.W. RIDGES & G.A. FORREST, CONSTITUTIONAL LAW 435 (1950).

[83] These families were granted citizenship by virtue of their connection with the Crown as a successor of the Dukes of Normandy, not as a British Monarch. *See* Andrew Massey, *Modernising Government in the Channel Islands: The Context and Problematic of Reform in a Differentiated but Feudal European Polity*, 82 PUB. ADMIN. 421, 427 (2004).

[84] *See* Protocol No. 3, *supra* note 80, art. 2; Case C-171/96, Rui Alberto Pereira Roque v. His Excellency the Lieutenant Governor of Jersey, 1998 E.C.R. I-4607 (illustrating special status enjoyed by islands in EC free movement law).

[85] The status of territories lying mainly outside EU law turned the Channel Islands into tax-heavens allowing them to attain the levels of GDP per head which are much higher than the UK average. Massey, *supra* note 83, at 426.

[86] Protocol No. 3, *supra* note 80, art. 6.

EU citizenship in Declaration number 2[87] annexed to the EEC Treaty by the British Government. Point "c" of the Declaration makes an express reference to Manxman and Channel Islanders, making it clear that they are UK nationals for purposes of Community Law.[88] In other words, the kind of minority protection as used in the Protocols to the 1972 Act of Accession is of dubious nature. While providing Minorities with special protection, it also strips them of some important rights.

A somewhat more usable standard of minority protection, including the protection of traditional occupations, culture, and linguistic diversity, first appeared in EU enlargement law during the fourth enlargement and dealt with the rights of the Sami people[89] and, to a lesser extent, with the Swedish-speaking population of the Åland Islands.[90] As a result of such measures, these minorities were, in the words of von Toggenburg, "[S]aved from unwanted effects of the Common Market."[91]

The principle of minority protection also acquired an immensely important role in the European Union's enlargement-flavored external relations with the countries of Central and Eastern Europe after the end of the Cold War,[92] especially through the protection of the "rights of persons belonging to minorities" clause of the Europe Agreements

---

[87] Council Declaration, New Declaration by the Government of the United Kingdom of Great Britain and Northern Ireland on the Definition of the Term "Nationals," 1983 O.J. (C 23) 1.

[88] Girard-Renée de Groot, *Towards a European Nationality Law*, 8.3 Elec. J. Comp. L. 1, 6 (2004), *available at* http://www.ejcl.org/83/art83-4.html.

[89] *See* Protocol No.3 on the Sami People, Act Concerning the Conditions of Accession of the Kingdom of Norway, the Republic of Austria, the Republic of Finland and the Kingdom of Sweden and the Adjustments to the Treaties on Which the European Union Is Founded arts. 1 & 2, 1994 O.J. (C 241) 352 [hereinafter 1994 Accession Act]. In relation to the rights of the Sami people, it is notable that Norway attached declarations to the Final Act of the Treaty of Accession reaffirming its commitment to respect the rights of the Sami people (with a particular reference to article 27 of the ICCPR) and declaring that Bokmal and Nynorsk should enjoy a status equal to Norwegian as the languages of the Communities. Final Act Concerning the Conditions of Accession of the Kingdom of Norway, the Republic of Austria, the Republic of Finland and the Kingdom of Sweden and the Adjustments to the Treaties on Which the European Union Is Founded, § III(G)(38)–(39), 1994 O.J. (C 241) 395. Norway failed to join the European Union in the end as a result of negative outcome of a popular referendum on this issue.

[90] Protocol No. 2 on the Åland Islands, 1994 Accession Act, *supra* note 89; *see* Edwige Tucny, L'élargissement de l'Union Européenne aux pays d'Europe centrale et orientale 16–17 (2000); Dierk Booß & John Forman, *Enlargement: Legal and Procedural Issues*, 32 Common Mkt. L. Rev. 95, 115 (1995).

[91] Gabriel von Toggenburg, *Minority Protection in a Supranational Context: Limits and Opportunities*, *in* Enlarged European Union, *supra* note 12, at 1, 24.

[92] Wiener & Schwellnus, *supra* note 12, at 2.

made with Central and Eastern European countries.[93] In other words, minority protection formed part of EU enlargement law before the first release of Copenhagen-related documents. Yet, only the fifth enlargement allowed minority protection to acquire a "clear political and legal dimension."[94] These developments notwithstanding, no clear minority protection clauses were included into the 2003 Treaty of Accession.[95]

B. *European Union Internal Dimension of Minority Protection*

Although an established enlargement law principle, minority protection is far from being well-rooted within the Community. Internally, minority protection has only manifested itself at the Community level on two occasions, both of them accidental and not expressly aimed at minority protection. The first such occasion was the adoption of the EU Special Support Program for Peace and Reconciliation in Northern Ireland,[96] and the second was a Member States' demarche against Austria after the inclusion of Jörg Haider's FPÖ into the coalition government in 2000.[97] The protection of minority rights was expressly mentioned during the crisis on a number of occasions, making scholars speculate that "the EU Member States and the EU institutions . . . would be opposed to any breach of *inter alia* minority rights by the Austrian government."[98] Ironically, the report of the "three wise men" who had been sent to Austria to investigate the situation concluded that Austria "protects the existing minorities . . . to a greater extent than

---

[93] Marc Maresceau, *Pre-Accession*, *in* The Enlargement of the European Union 9, 16 (Marise Cremona ed., 2003). For general information on the use of the human rights clauses in the EU external relations law, see generally Eibe Riedel & Martin Will, *Human Rights Clauses in External Agreements of the EC*, *in* The EU and Human Rights 723 (Philip Alston ed., 1999).

[94] *Rough Orientation*, *supra* note 33, at 11.

[95] von Toggenburg, *supra* note 91, at 24. The standards applied by the Commission to the assessment of minority protection in the candidate countries during the preparation of the fifth enlargement are assessed, *infra* Section V.

[96] Communication to the Council and the European Parliament—A Special Support Programme for Peace and Reconciliation in Northern Ireland, at 1, 3, COM (1994) 607 final (July 12, 1994); *see also* Cathal McGall, *Postmodern Europe and the Resources of Communal Identities in Northern Ireland*, 33 Eur. J. of Pol. Res. 389, 392 (1998).

[97] Although one can argue that the European Union did not play an important role in the Austrian crisis, the actions of the fourteen Member States were obviously coordinated and cannot be treated simply as the initiatives of the individual member states. *See generally* Matthew Happold, *Fourteen Against One: The EU Member States' Response to Freedom Party Participation in the Austrian Government*, 49 Int'l & Comp. L. Q. 953 (2000); Michael Merlingen, Cas Mudde, & Urich Sedelmeier, *The Rights to Be Righteous?: European Norms, Domestic Politics and the Sanctions Against Austria*, 39 J. Common Mkt. Stud. 59 (2001).

[98] *See* Henrard, *supra* note 11, at 366; Schwellnus, *supra* note 50, at 21.

such protection exists in many other EU countries,"[99] thus failing to establish a link between the nature of the government in power and possible minority rights violations.

It is clear that the first example aimed at the establishment of peace and security, and the second dealt with democracy and human rights protection in the broadest possible sense. Neither of them really focused on minority rights, nor did they adopt any viable minority protection standard or go beyond mere political declarations. Minority protection only came as an unavoidable consequence of Community interference.

Although absent from the binding sphere of the *acquis,* minority protection is nevertheless well-rooted in the sphere of nonbinding acts and political declarations. The importance of minority protection in the European Community was asserted by the 1991 Luxembourg European Council, which adopted a Declaration on Human Rights. That declaration states that respect of the minority protection principle "will favour political, social and economic development."[100] The European Parliament (EP) has also demonstrated its willingness to contribute to the minority protection debate at the EU level on several occasions.[101] The EP put forward a number of initiatives to introduce minority protection into the texts of Treaties during every Treaty revision exercise, but these propositions were disregarded and none passed.[102] Once again, consensus on this point appears to be missing among the *Herren der Verträge.*

---

[99] Martti Ahtisaari, Jochen Frowein, & Marcelino Oreja, *Report to the European Court of Human Rights*, § 29 (Sept. 8, 2000).

[100] Declaration on Human Rights, Annex V to the Presidency Conclusions, June 28–29, 1991.

[101] A number of European Parliament resolutions specifically deal with the problems related to minority protection. *See, e.g.*, Linguistic and Cultural Minorities in the European Community, 1994 O.J. (C 61) 110; Languages and Cultures of Regional and Ethnic Minorities in the European Community, 1987 O.J. (C 318) 160; Measures in Favour of Minority Languages and Cultures, 1983 O.J. (C 68) 103; Community Charter of Regional Languages and Cultures and on a Charter of Rights of Ethnic Minorities, 1981 O.J. (C 287) 106. Another group of resolutions mentions the importance of the issue in a wider context. *See, e.g.*, Human Rights in the World in 1997 and 1998 and EU Human Rights Policy, 1999 O.J. (C 98) 270, 270; Racism, Xenophobia and Anti-Semitism and on Further Steps to Combat Racial Discrimination, 1999 O.J. (C 98) 488, 489; The Role of Public Service Television in a Multi-Media Society, 1996 O.J. (C 320) 180, 181. Numerous resolutions deal with specific minorities. *See, e.g.*, The Protection of Minority Rights and Human Rights in Romania, 1995 O.J. (C 249) 157, 157.

[102] *See* Bruno de Witte, *The European Community and Its Minorities, in* Peoples and Minorities in International Law 179 (Catherine Brölmann et al. eds., 1992). We know from the history of European integration that proposals put forward by the EP have been followed on a number of occasions, though with considerable delay. The possibility to combat discrimination on the grounds of ethnicity, racial origin or belonging to a national

C. *The "Officers' Maxim" Applied (The Paradox)*

Thus, with the exception of a number of political declarations, the idea of minority protection going beyond simple non-discrimination has failed to get to the Community level and enter the scope of the *acquis communautaire*, in order that it may have an internal grip on Member States.[103] Such a limited role of minority protection within the European Union does not, however, exclude possible developments in this field.[104] Although pessimistic, it is nevertheless highly unlikely that minority protection will become a matter of large-scale EU involvement in the near future as "there remains an evident lack of competence, *i.e.* mandate provided by the Treaty's High Contracting Parties, regarding ethnic or linguistic minorities."[105] A minority protection standard common to EU Member States is also missing.[106] All this threatens to turn EU pre-accession promotion of minority rights into "measuring progress in the absence of benchmarks."[107]

A paradox is evident: an all too powerful principle of EU enlargement law is not at all important internally.[108] Even the absence of minority protection from the *acquis* and the non-existence of a common Member States' standard in the field did not prevent the Community (and especially the Commission) from giving minority protection full priority over other issues during the pre-accession progress assessment exercise.[109]

That is to say, just as with general human rights protection,[110] minority protection is an instance in which the difference between "in-

---

minority (a wording very similar to article 14 of the ECHR) was contained in the 1993 EP initiative for a draft Constitution of the European Union, Title VIII. *See* Eur. Parl. Doc. A3-0064/93, § 3(b) (1993). One may speculate that this initiative contributed to the later drafting of article 13 of the EC Treaty and the adoption of Directive 2000/43/EC.

[103] *See* Brusis, *supra* note 33, at 1; Martín Estébanez, *supra* note 33, at 135; Schwellnus, *supra* note 50, at 2; Wiener & Schwellnus, *supra* note 12, at 2.

[104] *See The Union's Role*, *supra* note 73, at 27.

[105] *See Rough Orientation*, *supra* note 33, at 2.

[106] *See* Schwellnus, *supra* note 50, at 2; Wiener & Schwellnus, *supra* note 12, at 13.

[107] *See* Hughes & Sasse, *supra* note 12, at 67.

[108] *See* Hillion, *supra* note 12; *see also* Hughes & Sasse, *supra* note 12, at 61–62.

[109] *See* Maresceau, *supra* note 6, at 16.

[110] In the sphere of human rights protection, the external competences are much broader than the internal ones. *See* Philip Alston & J.H.H. Weiler, *An 'Ever Closer Union' in Need of a Human Rights Policy: The European Union and Human Rights*, *in* The EU and Human Rights, *supra* note 93, at 3, 6–9; Andrew Clapham, *A Human Rights Policy of the European Community*, 10 Y.B. Eur. L. 309, 345–56 (1990); Dominic McGoldrick, *The European Union After Amsterdam*, *in* Legal Issues of the Amsterdam Treaty 249, 249–70 (David O'Keeffe & Patrick Twomey eds., 1999) (illustrating external dimension).

ternal" and "external" EU action is crucial.[111] Taking minority protection requirement as an example, one can argue that "in the context of pre-accession, the constitutional principle of 'conferral of powers'[112] does not apply."[113]

The gap between internal and external EU minority protection regulation is especially acute after the fifth enlargement, which has only broadened this "political lacuna,"[114] effectively separating external demands addressed by the Community to the new-comers and the internal protection of minorities within the Community.[115]

This gap can give rise to a number of far-reaching problems. Clearly, the European Union lost its competence in the field of minority protection after accession became a fact: pre-accession strategy ceased to apply, as did the Copenhagen political criteria. Moreover, the EU minority protection system is practically nonexistent and fails to provide a reasonable degree of protection.[116] Thus, in order for the European Union to achieve some results in the sphere of minority protection, all minority protection reform in the candidate countries should be completed before, not after the enlargement. Viewed from this perspective, minority protection is distinct from all elements of the Copenhagen criteria falling within the scope of the *acquis* because compliance with the latter is tested only after accession,[117] and EU involvement remains high. This observation also helps explain the high level of attention the Commission pays to monitoring candidate countries' compliance with the minority protection criterion, as outlined at Copenhagen.

Thus, although minority protection in the context of enlargement includes both components of minority protection, the European Union's "internal" minority protection is based purely on nondiscrimination, thus covering only half of the standard as outlined in the PCIJ's *Albanian Schools* case and Kymlicka's writings. Although a theoretical

---

[111] VAN DER MEULEN, *supra* note 12, at 5; Schwellnus, *supra* note 50, at 1.

[112] Treaty Establishing European Community, Nov. 10, 1997, 1997 O.J. (C 340) 5 [hereinafter EC Treaty] ("The Community shall act within the limits of powers conferred upon it by this Treaty and of the objectives assigned therein.").

[113] *See* Hillion, *supra* note 12, at 716.

[114] von Toggenburg, *supra* note 91, at 10.

[115] Although ready to discuss minority languages protection in the candidate countries, the Commission is not ready to give a clear answer to the question regarding protection of minority languages in France. *See* Written Question 963/98, 1998 O.J. (C 310) 150.

[116] For an argument for the continuation of minority rights monitoring after enlargement, see Hoffmeister, *supra* note 45, at 105.

[117] *See, e.g.,* EC Treaty, *supra* note 64, arts. 226–228, 234.

possibility of embracing the whole approach can, in principle, be found in the body of Community Law, the political will to move in this direction is missing. This picture becomes even more complicated if one scrutinizes the EU standards employed during the pre-accession assessment of the candidate countries' adherence to the minority protection criterion.

V. Pre-Accession Assessment: Is Estonia Really So Different from Slovakia?

Based on the texts of the Copenhagen-related documents, one can develop a classification of the Commission's approaches to addressing minority protection in different candidate countries.[118] A number of approaches emerge.

For some countries, the issue of minority protection was less acute due to a lack of a significant minority population. The Commission adopted an inclusive approach to monitoring minority protection among the candidate countries, and did not specify any minimum minority population necessary for country monitoring in this field to begin.[119] Nevertheless, the Commission has been reproached for expressly withdrawing from the assessment of the minority situation in some of the candidate countries, Poland is the most telling example of such a practice.[120] The Commission did not even criticize the fact that Poland was one of the last among the Central and Eastern European countries to ratify the CoE Framework Convention.[121] It appears that in some candidate countries, conditionality of minority protection during preparation for the fifth enlargement was almost not applied, or was only applied at a rudimentary level, compared to other candidate countries.

It is difficult to establish with certainty the exact sizes of minority populations in the countries of Central and Eastern Europe. The statistical data concerning minority population in that region has been called a "great illusion."[122] Although minority population data can pro-

---

[118] *See* Hughes & Sasse, *supra* note 12, at 14 (making distinction between Roma and Russian-speaking minority versus all other minorities).

[119] *See infra* note 136. Even the situation of tiny minorities, such as Csango in Romania, was monitored. *See id.*

[120] *See* Wiener & Schwellnus, *supra* note 12, at 21–28; *see also* Vermeersch, *supra* note 12, at 18–21.

[121] Comm'n of the Eur. Cmtys., Regular Report on Poland's Progress Towards Accession, at 19 (2000), *available at* http://ec.europa.eu/enlargement/archives/pdf/key_documents/2000/pl_en.pdf (noting that Convention is not ratified).

[122] *See* Andre Liebich, *Ethnic Minorities and Long-Term Implications of EU Enlargement* 16 (Eur. Univ. Inst., Working Paper No. 49, 1998).

vide a frame of reference, it is far from reality.[123] This issue is especially acute in the case of Roma populations;[124] it equally concerns all the candidate countries, acceding states and the (new) Member States. It is clear, however, that in countries that joined the European Union in 2004 and 2007, millions of people are discriminated based on their belonging to a minority group.

Judging both by the substance and structure of the Copenhagen-related documents concerning minority protection in the countries that joined in 2004 and 2007, considered by the Commission as problematic, one sees two distinct groups of states. The Commission's approach to them appears to be different, which substantiates the claim that "[minority protection] conditionality varies greatly across accession states."[125] Despite a simple non-inclusion of the issue of minority protection in the Copenhagen-related documents, released in the context of some candidate countries' pre-accession process, the Commission did not formulate a single approach for all candidate countries where this issue was assessed.[126]

The first group of candidate countries included Bulgaria,[127] Romania,[128] Slovakia,[129] Hungary,[130] the Czech Republic,[131] and, among the

---

[123] For some statistical estimates, see *id*. at app. II.

[124] *See* Istvan Pogány, *Legal, Social and Economic Challenges Facing the Roma of Central and Eastern Europe*, 2 Queen's Papers on Europeanisation 2 n.6 (2004), *available at* http://www.qub.ac.uk/schools/SchoolofPoliticsInternationalStudiesandPhilosophy/Research/PaperSeries/EuropeanisationPapers/PublishedPapers (Follow the "2004" hyperlink); Peter Vermeersch, *Ethnic Mobilisation and the Political Conditionality of EU Accession*, 28 J. Ethnic & Migration Stud. 83, 88–89 (2002).

[125] Wiener & Schwellnus, *supra* note 12, at 15.

[126] *See, e.g.,* Wojciech Sadurski, *Constitutional Courts in the Process of Articulating Constitutional Rights in the Post-Communist States of Central and Eastern Europe. Part III: Equality and Minority Rights* (Eur. Univ. Inst., Working Paper No. 1, 2003), *available at* http://cadmus.iue.it/dspace/index.jsp (Follow the "Date" hyperlink; then select "2003") (discussing minority protection in constitutional law of countries in this group).

[127] *See, e.g.,* Antonina Zhelyazkova, *The Bulgarian Ethnic Model*, 10 East Eur. Const. Rev. 62, 62–66 (2001).

[128] *See generally* István Horváth & Alexandra Scacco, *From the Unitary to the Pluralistic: Fine Tuning Minority Policy in Romania*, *in* Diversity in Action 241 (Anna-Mária Bíró & Petra Kovács eds., 2001); Melanie Ram, *Minority Relations in Multiethnic Societies: Assessing the EU Factor in Romania*, 1 Rom. J. Poli. Sci. 2 (2001).

[129] *See* Kyriaki Topidi, *The Limits of EU Conditionality: Minority Rights in Slovakia*, 1 J. Ethnopolitics & Minority Issues in Eur. 1, 2 (2003), *available at* http://www.ecmi.de/jemie/download/Focus1-2003_Topidi.pdf.

[130] *See generally* Andrea Krizsán, *The Hungarian Minority Protection System: A Flexible Approach to the Adjudication of Ethnic Claims*, 26 J. Ethnic & Migration Stud. 2 (2000); Vermeersch, *supra* note 12, at 11–15.

[131] *See, e.g.,* Vermeersch, *supra* note 12, at 15–17.

present-day candidate countries, Croatia.[132] The Copenhagen-related documents concerning minority protection in these countries did not contain any special substructure and dealt with a number of minorities, mostly concentrating on the situation of the Roma,[133] ethnic Hungarians[134] (mostly in Slovakia and Romania), and ethnic Turks (in Bulgaria).[135] A number of smaller minority groups were also mentioned (*e.g.*, the Csango minority in Romania).[136] While dealing with these countries, the Commission advocated wider inclusion for the minority population, respect and support for minority cultures, introduction of education in minority languages (including higher education for some minority groups), and never criticized the grant of cultural autonomy.[137] A special emphasis was made on the issue of nondiscrimination on the ground of belonging to an ethnic minority.

The second group of countries was considerably smaller and included Latvia and Estonia. The Copenhagen-related documents concerning the state of minority protection in those countries adopted a special structure, different from that contained in the Copenhagen-related documents dealing with the first group. The discussion focused on the situation of the "Russian-speaking" minority,[138] although,

---

[132] *See generally* Antonija Petričušić, *Wind of Change: The Croatian Government's Turn Towards a Policy of Ethnic Reconciliation*, 6 Eur. Diversity & Autonomy Papers (2004), *available at* http://www.eurac.edu/documents/edap/2004_edap06.pdf.

[133] For a general discussion on the Roma population, see Dena Ringold, Roma and the Transition in Central and Eastern Europe (2000); Marc W. Brown, *The Effect of Free Trade, Privatisation and Democracy of the Human Rights Conditions for Minorities in Eastern Europe: A Case Study of the Gypsies in the Czech Republic and Hungary*, 4 Buff. Hum. Rts. L. Rev. 275, 276–78 (1998); Pogány, *supra* note 124; István Pogány, *Accommodating an Emergent National Identity: The Roma of Central and Eastern Europe,* 6 Int'l J. Minority & Group Rts. 149, 152–58 (1999); Vermeersch, *supra* note 12.

[134] *See generally* Geri Haight, *Unfulfilled Obligations: The Situation of the Ethnic Hungarian Minority in the Slovak Republic*, 4 ILSA J. Int'l & Comp. L. 27 (1997) (providing overview of situation of Hungarian minority).

[135] *See* Zhelyazkova, *supra* note 127, at 62–66.

[136] By mentioning this particular minority in the Regular Reports, the Commission followed the Parliamentary Assembly of the Council of Europe. *See* Eur. Parl. Ass., *Recommendation 1521: Csango Minority Culture in Romania* (May 4, 2001).

[137] For information on the minority protection policies in Eastern European countries, see generally Peter Vermeersch, *EU Enlargement and Minority Rights Policies in Central Europe: Explaining Policy Shifts in the Czech Republic, Hungary and Poland*, 1 J. Ethnopolitics & Migration in Eur. (2003), *available at* http://ecmi.de/jemie/download/Focus1-2003_Vermeersch.pdf.

[138] For information on the "Russian-speaking" minority, see generally Lowell Barrington, *The Domestic and International Consequences of Citizenship in the Soviet Successor States*, 47 Eur.-Asia Stud. 731 (1995); Ruta M. Kalvaitis, *Citizenship and National Identity in the Baltic States*, 16 B.U. Int'l L.J. 231 (1998); Peter Van Elsuwege, *State Continuity and Its Consequences: The Case of the Baltic States*, 16 Leiden J. Int'l L. 377, 377–88 (2003); Andrea Han-

just as in the previous group, a number of other minorities were also discussed. In the context of Estonian and Latvian applications for accession, the Commission relied heavily on the CoE findings[139] as well as on the findings of the Organization for Security and Co-operation in Europe (OSCE),[140] and was backing developments drastically different from the demands addressed to candidate countries in the first group. Concerning the OSCE's role, it has been argued that the European Union has "delegated to the High Commissioner on National Minorities (HCNM) the task of judging whether [the candidate countries] have 'done enough' in terms of minority rights."[141] The references to the OSCE position are contained both in the Europe Agreements with Estonia and Latvia[142] and in the Accession Partner-

---

neman, Note, *Independence and Group Rights in the Baltics: A Double Minority Problem*, 35 VA. J. INT'L L. 485 (1995); Jekaterina Dorodnova, *EU Concerns in Estonia and Latvia: Implications of Enlargement for Russia's Behaviour Towards the Russian-speaking Minorities* (Eur. Univ. Inst., Working Paper No. 40, 2000); Nida M. Gelazis, *The Effects of EU Conditionality on Citizenship Policies and Protection of National Minorities in the Baltic State*s (Eur. Univ. Inst., Working Paper No. 68, 2000); David J. Smith, *Minority Rights, Multiculturalism and EU Enlargement: The Case of Estonia*, 1 J. ETHNOPOLITICS & MIGRATION IN EUR. 1 (2003), *available at* http://ecmi.de/jemie/download/Focus1-2003_Smith.pdf; Vadim Poleštšuk & Aleksei Semjonov, Minorities and Majorities in Estonia: Problems of Integration at the Threshold of the EU, Presentation at International Seminar in Tallinn, Estonia (Jan. 8–9, 1999), *available at* http://www.lichr.ee/rus/centre/seminari/seminar1999.rtf.

[139] *See* Eero Aarnio, *Minority Rights in the Council of Europe*, *in* UNIVERSAL MINORITY RIGHTS 123, 123 (Alan Phillips & Allan Rosas eds., 1995); Geoff Gilbert, *Minority Rights in the Council of Europe*, *in* MINORITY RIGHTS IN THE 'NEW' EUROPE, *supra* note 62, at 53, 53.

[140] *See generally* Arie Bloed, *The OSCE and the Issue of National Minorities*, *in* UNIVERSAL MINORITY RIGHTS, *supra* note 139, at 113, 123; Rob Zaagman, *Conflict Prevention in the Baltic States: The OSCE High Commissioner on National Minorities in Estonia, Latvia and Lithuania* (Eur. Ctr. for Minority Issues, Monograph 1, 1999), *available a*t http://www.ecmi.de/rubrik/56/monographs; Wolfgang Zelliner, On the Effectiveness of the OSCE Minority Regime: Comparative Case Studies on Implementation of the Recommendations of the High Commissioner on National Minorities of the OSCE (1999) (Inst. for Science & Health, 1999).

[141] *See* Will Kymlicka, *Reply and Conclusion*, *in* CAN LIBERAL PLURALISM BE EXPORTED? 345, 375 (Will Kymlicka & Magda Opalski eds., 2001).

[142] *See* Europe Agreement Establishing an Association Between the European Communities and Their Member States and the Republic of Estonia, Preamble, 1998 O.J. (L 68) 3, 3–4 ("Considering the commitment to the intensification of political and economic liberties which constitute the basis of this Agreement and to further development of Estonia's new economic and political system which respects—in accordance *inter alia* with the undertakings made within the context of the . . . Organisation for Security and Cooperation in Europe (OSCE)—the rule of law and human rights, including the rights of persons belonging to minorities."); *see also* Europe Agreement Establishing an Association Between the European Communities and Their Member States, and the Republic of Latvia, Preamble, 1998 O.J. (L 26) 3, 3–4 (containing an identical provision).

ships,[143] making the HCNM's recommendations *de facto* enforceable law in the context of enlargement.

The Commission focused on a number of negative developments in the field of minority rights in these countries, but ultimately tolerated established discrimination against minority groups in Latvia and Estonia. Unfortunately, the Commission mostly concentrated on the instances of discrimination that were in blunt contradiction with the obligations stemming from the Europe Agreements made with Estonia, particularly "in the fields of free movement of persons, right to establishment, supply of services, capital movements and award of public contracts."[144] In other words, the market-oriented nature of the European Union prevailed. There was little criticism of the policy of assimilation of the minority population and the exclusion of minorities from many spheres of life, which resulted in the marginalization of minorities—a reality in the countries of the second group.[145] The policy of the countries in question, which the Commission tolerated, amounted to attempts to trigger exclusion and, eventually, the emigration of minorities.[146] This approach was on its face contradictory to the spirit of inclusion and tolerance the Commission promoted in the first group.

Adopting different approaches to minority protection depending on the countries in which the assessment was conducted, and a particular minority in question, is not in accord with the pre-accession principle of conditionality that consisted of the objective assessment of all candidate countries' progress based on the same criteria. Moreover, even within each of the groups, the Commission's approach to

---

[143] The Accession Partnership with Latvia does not mention the OSCE findings directly; however, the Accession Partnership, makes a reference to acting "in line with the principle of proportionality, international standards and the Europe Agreement." *See* Council Decision 2002/88, 2002 O.J. (L 44) 45, 47; *see also* Council Decision 2002/86, 2002 O.J. (L 44) 29, 31 (making reference, in Accession Partnership with Estonia, to acting "in line with both international standards and the Europe Agreement and respects the principles of justified public interest and proportionality").

[144] Comm'n of the Eur. Cmtys., Regular Report on Estonia's Progress Towards Accession, at 15 (1999), *available at* http://ec.europa.eu/enlargement/archives/enlargement_process/past_enlargements/eu10/estonia_en.htm [hereinafter 1999 Estonian Report].

[145] *See infra* Sections V. C–G.

[146] *See* James Hughes, *"Exit" in Deeply Divided Societies: Regimes of Discrimination in Estonia and Latvia and the Potential for Russophone Migration*, 43 J. OF COMMON MKT. STUD. 739, 740–46 (2005); Abdullakh Mikitajev, *Problemy grazhdanstva russkikh i russkojazychnogo naselenija v Latvii i Estonii*, 3 ROSSIJSKIJ BIULLETEN' PO PRAVAM CHELOVEKA 89 (1994), *available at* http://www. hrights.ru/text/b3/bul3.htm.

minority protection differed from country to country. Different degrees of pressure and scrutiny were applied.[147]

The main differences between the Commission's approaches to the assessment of minority protection in the countries belonging to the first and the second group concerned the following issues:

- Structural approaches to minority rights assessment;
- Naming the minorities concerned;
- Different approaches to the link between belonging to a given minority and the citizenship of a country in question;
- Different approaches to minority education in both groups;
- Different approaches to nondiscrimination in both groups;
- Different approaches to minority self-government in both groups;
- Different approaches to the political rights enjoyed by minorities in both groups.[148]

A. *Two Groups of Countries and the Structure of the Copenhagen-Related Documents*

Although the Commission built approaches to the integration of the Russian minorities in Estonia and Latvia and the minorities in other candidate countries along totally different lines, this difference was not reflected in the structure of all the Copenhagen-related documents. It would have been naïve to expect the Commission to introduce into the regular reporting exercise such a differentiated treatment of minorities already at the structural level; this would be in blunt disaccord with the principles of enlargement law, making all the reasonable claims for predictability of the enlargement process irrelevant.[149] Although the two-tier structure of the problematic countries is not articulated in the structure of the Copenhagen-related documents, such as composite

---

[147] For the differences in the Commission's analysis of Poland, Hungary and Romania, see Wiener & Schwellnus, *supra* note 12, at 15.

[148] This list is not exclusive and is drafted solely to provide an example of the varied approaches to minority protection used by the Commission.

[149] Scholars argue that by and large the introduction of the principle of conditionality and its subsequent application did not make the enlargement process more predictable and clear. *See, e.g.*, Christophe Hillion, *Enlargement of the European Union: A Legal Analysis*, *in* Accountability and Legitimacy in the European Union 401, 402 (Anthony Arnull & Daniel Wincott eds., 2002); *cf.* Kochenov, *supra* note 3, at 300–11.

and strategy papers, the same cannot be said about the structure of the Commissions regular reports.[150]

The composite and strategy papers' approach to the issue is unsystematic. The 1998 Composite Paper tackles three main issues concerning minority protection: the situation in Latvia and Estonia; the situation with Roma; and the situation of Hungarian minorities in Romania and Slovakia.[151] One can find a similar structure of the assessment of the candidate countries' progress in other papers as well. The 1999 Composite Paper notes the progress with the handling of minority protection in Estonia and Slovakia, discusses the need of "finding the right balance between legitimate strengthening of the state language and the protection of minority language rights,"[152] and the situation with Roma and Hungarian minorities. The 2001 Strategy Paper narrows the minority protection assessment to two main issues: the situation in Latvia and Estonia and the protection of Roma rights.[153] The 2002 Paper's structure puts a dividing line between the issues of Roma protection and minority protection—the latter includes all other minorities.[154]

Overall, the composite and strategy papers do not provide clear guidance through minority protection particularities, and limited to inconsistently hand-picking certain issues while failing to see the larger picture.[155] This demonstrates an approach similar to that the Commission adopted during the pre-accession assessment of democracy and the rule of law in the candidate countries.[156]

---

[150] For the structure of the whole body of the Copenhagen-related documents, including documents released in implementation of the conditionality principle of the Copenhagen criteria, see Kochenov, *supra* note 11, at 5–7.

[151] Comm'n of the Eur. Cmtys., *Composite Paper: Reports on Progress Towards Accession by Each of the Candidate Countries*, at 4 (1998), *available at* http://ec.europa.eu/enlargement/archives/pdf/key_documents/1998/composite_en.pdf.

[152] Comm'n of the Eur. Cmtys., *Composite Paper: Reports on Progress Towards Accession by Each of the Candidate Countries*, at 15 (1999), *available at* http://ec.europa.eu/enlargement/archives/key_documents/reports_1999_en.htm.

[153] *Towards the Enlarged European Union: Strategy Paper and Report of the European Commission*, at 13, COM (2001) 700 final (Nov. 13, 2001).

[154] *Towards the Enlarged European Union: Strategy Paper and Report of the European Commission*, at 14–15, COM (2002) 700 final (Oct. 9, 2002).

[155] The same lack of guidance is also largely true regarding the pre-accession assessment of the rights of sexual minorities. *See* Dimitry Kochenov, *Democracy and Human Rights—Not for Gay People? EU Eastern Enlargement and Its Impact on the Protection of the Rights of the Sexual Minorities*, 13 Tex. Wesleyan L. Rev. 459, 482–91 (2007) [hereinafter *Democracy and Human Rights*]; *see also* Peter Van Elsuwege, *Prodvizhenije demokratii v sosednikh ES stranakh: Uroki strategii predvaritel'nyh uslovij chlenstva*, *in* Prodvizhenije demokraticheskih tzennostej v rasshiriajushchejsia Jevrope: Izmeniajushchiajasia rol' Baltijskih gosudarstv ot importërov k èksportëram 45 (A. Kasecamp & H. Pääbo eds., 2006).

[156] *See* sources cited *supra* note 155.

A different picture is observed through study of the regular reports. Dealing with the second group of countries, the Commission applies a specific "naturalization-oriented" structure of the reports, including subheadings dedicated to the issuance of residence permits and granting citizenship to the members of the minority communities. Thus, all the regular reports dealing with the second group of countries were structurally different from those dealing with the first group. The structure the Commission introduced was mainly threefold, including:

1. A naturalization procedure;
2. Residence permits and special passports for non-citizens; and
3. The integration of minorities.[157]

Several regular reports also contained a subchapter on linguistic legislation.[158] It is clear from this structure that the Commission shifted the accents in its assessment of minority protection in Latvia and Estonia, compared to the minority protection in the first group. Predictably, there was considerable difference in the substantive approach to the minority protection assessment between the countries in the first and second groups.

B. *Different Definitions of "Minority" Applied in the Two Groups*

As in international law, in which there is no consensus concerning the definition of "minority," the Commission gave "minority"[159] a meaning that differed considerably from the definition adopted in scholarly literature.[160] Moreover, the Commission's definitions for the first and the second groups of countries differed considerably.

---

[157] *See generally* Estonian and Latvian Regular Reports, *available at* http://ec.europa.eu/enlargement/key_documents/index_archive_en.htm.

[158] *See* 1999 Estonian Report, *supra* note 144, at 14. *But see* Comm'n of the Eur. Cmtys., Regular Report on Latvia's Progress Towards Accession (1999), *available at* http://ec.europa.eu/enlargement/archives/enlargement_process/past_enlargements/eu10/latvia_en.htm (failing to contain similar subchapter is strange given similarity of problems these two countries faced).

[159] *See* Henrard, *supra* note 12, at 367–70; Mullerson, *supra* note 14, at 807; Schulte-Tenckhoff & Ansbach, *supra* note 35, at 17; John R. Valentine, *Toward a Definition of National Minority*, 32 Denv. J. Int'l L. & Policy 445, 463 (2004). *See generally* Defining "Minority," *supra* note 35.

[160] *See* Henrard, *supra* note 12, at 367–70; Mullerson, *supra* note 14, at 807; Schulte-Tenckhoff & Ansbach, *supra* note 35, at 17; Valentine, *supra* note 159, at 463.

A definition of "minority" is nowhere to be found in the Copenhagen-related documents, leaving it to the candidate countries to determine whom the Commission was asking them to respect and protect. Several peculiar features of the Commission's understanding of the term follow directly from the Opinions and regular reports.

First, the Commission's notion of "minority" used in the majority of the Copenhagen-related documents is limited to national minorities, thus excluding a whole range of other minority groups that might otherwise deserve protection. It is true that the Commission addresses the rights of some other minority groups, like religious and sexual minorities, in sections of the Copenhagen-related documents dedicated to other groups of rights.[161] At the same time, it is surprising that the Commission never used the term "national" or "ethnic" minorities in the regular reports, insisting on a broader term "minority" that might appear misleading. It is worth noting here that article 27 of the International Covenant on Civil and Political Rights (ICCPR) distinguishes between at least three kinds of minorities: ethnic; linguistic; and religious.[162] The CoE Framework Convention adopts a slightly different approach, talking about national minorities without specifying this term.[163]

By taking such an ill-articulated view of minorities, the Commission did not necessarily act in accordance with a definition of minorities used by other Community institutions. The EP, for example, called for laying "particular stress on the rights of minorities (ethnic, linguistic, religious, homosexual, etc.) at the time of enlargement negotiations."[164]

Second, there is certainly some confusion in the way the Commission named the minorities whose situation it monitored. It downgraded the importance of some minorities by defining them differently from other minority groups in similar situations. Talking about a Hungarian minority living in Slovakia or Romania, the Commission

---

[161] *See, e.g.*, *Democracy and Human Rights, supra* note 155, n.88 (demonstrating that sexual minorities were not dealt with in the minority rights sections of the Commission's reports). Religious minorities were dealt with in the context of assessment of the "freedom of religion," which also falls outside of the "Minority Protection" sections of the Copenhagen Related documents. *See, e.g.*, *See* Comm'n of the Eur. Cmtys., Regular Report on Romania's Progress Towards Accession, at 21 (2000), *available at* http://ec.europa.eu/enlargement/archives/key_documents/reports_2000_en.htm.

[162] *See* Valentine, *supra* note 159, at 455.

[163] *See* Gilbert, *supra* note 139, at 55.

[164] *See* Eur. Parl. Comm. on Civil Liberties & Internal Affairs, Annual Report on Respect for Human Rights in the European Union, EUR. PARL. DOC. A4–0468/98, ¶ 10 (1997) (also known as the Schaffner Report).

used the term "Hungarian minority," though in discussing minorities in Estonia and Latvia the term was "Russian-speaking minority."[165] The denomination of what kind of minority is dealt with in the regular reports is of crucial importance and can have considerable implications on the strategy and practice of minority protection. The term "Russian-speaking minority" is arguably narrower in meaning (and also might be interpreted to demand a different scope of protection compared to other minority groups assessed by the Commission) than Russian minority. The latter, also including linguistic rights, puts equal emphasis on culture and group identification based on common history, and values, and is not limited to linguistic factors.[166] Thus, in the context of the two groups outlined *supra,* the Commission started differentiating between minorities in Latvia and Estonia on the one hand and minorities in the second group on the other by defining "minorities" differently.

C. *Minorities and Citizenship: Different Approaches in the Two Groups*

The Commission behaved wisely by refusing, on several occasions, to follow the definitions adopted in a given candidate country, thereby trying to look into the substance of the issue of minority protection.[167] This issue was particularly acute for the second group of countries. Latvia and Estonia, for example, were eager to make a connection between minority status and national citizenship, thus excluding all non-citizens living (and often born) in their territory from the scope of application of the minority protection criterion. Unlike in the other "states that emerged from the collapse of the Soviet Union [and] chose a 'zero option' for citizenship, by which all permanent residents were granted citizenship without naturalization,"[168] huge portions of the permanent

---

[165] *E.g.*, Agenda 2000—Commission Opinion on Estonia's Application for Membership, Eur. Comm'n Doc/97/12, at 2 (July 15, 1997), *available at* http://ec.europa.eu/enlargement/archives/pdf/dwn/opinions/estonia/es-op_en.pdf [hereinafter Commission Opinion on Estonian Application]; *see also* EU Enlargement, http://ec.europa.eu/enlargement (containing all other relevant Opinions and Reports issued by Commission) (last visited Jan. 17, 2008).

[166] *See generally* Fernand de Varennes, *The Protection of Linguistic Minorities in Europe and Human Rights: Possible Solutions to Ethnic Conflicts?*, 2 COLUM. J. EUR. L. 107 (1996) (discussing linguistic minority rights).

[167] von Toggenburg, *supra* note 91, at 9.

[168] Lowell Barrington, *The Making of Citizenship Policy in the Baltic States*, 13 GEO. IMMIGR. L.J. 159, 166 (1999). It is notable that the 1991 Treaty on the Principles of the Interstate Relations, between the RSFSR (as Russia was then called) and Estonian Republic, was the first step to a similar solution. In Article 3.1, this treaty offered the minorities a choice of either Estonian citizenship or citizenship of the RSFSR. At the same time, Article 3.3

population of Latvia and Estonia were not granted citizenship rights after the dissolution of the Soviet Union, and thus remained stateless.[169]

In dealing with the countries of the second group, the Commission did not allow such a narrow reading of "minority" to become the starting point of the pre-accession assessment. The Commission pointed out in the Opinions on the Latvian application for EU membership that the assessment of minority protection should be made solely based on the *de facto* situation, "[R]egardless of the nationality held and difference in personal status arising from non-possession of Latvian nationality."[170] One finds an almost identical wording in the Commission's Opinion regarding Estonia's application.[171] The Commission has consistently followed the same approach in the regular reports that followed.[172] Such a constructive approach to the definition of minorities in the context of these two countries' pre-accession progress resulted in some mild changes in the naturalization policy adopted in Latvia and Estonia.[173] The Commission stopped short of capitalizing on the achieve-

---

imposed an obligation to reach a special agreement regarding citizenship issues, but such an agreement has never been reached concluded. The Treaty was ratified by the Supreme Soviet of the Republic of Estonia on January 15, 1991. *See* Vedomosti Estonskoj Respubliki 1991, No. 2. The Treaty was ratified by the Supreme Soviet of the RSFSR on December 26, 1991. *See* Vedomosti RSFSR 1992, No. 3.

[169] *See* Slivenko v. Latvia, App. No. 48321/99, 2002-II Eur. Ct. H. R. 467 (2003) (Maruste, J., dissenting) (discussing occupation thesis); Jeffrey L. Blackman, *State Successions and Statelessness: The Emerging Right to an Effective Nationality Under International Law*, 19 Mich. J. Int'l L. 1141, 1191–94 (1998) (discussing secession and right to nationality under international law); Press Release, Alexander Yakovenko, Spokesman, Ministry of Foreign Aff. of the Russian Federation (Jan. 20, 2005), *available at* http://www.ln.mid.ru (discussing position of Russian Federation concerning Soviet occupation of Baltic States). Some argue that the European Union recognized such a position in order to justify its policy of differentiation between the Baltic Republics and other post-Soviet states. *See generally* Peter Van Elsuwege, *The Baltic States on the Road to EU Accession: Opportunities and Challenges*, 7 Eur. Foreign Aff. Rev. 171 (2002).

[170] Agenda 2000—Commission Opinion on Latvia's Application for Membership in the European Union, Eur. Comm'n Doc/97/14, at 18 (July 15, 1997), *available at* http://ec.europa.eu/enlargement/archives/enlargement_process/past_enlargements/eu10/latvia_en.htm [hereinafter Commission Opinion on Latvia's Application].

[171] Agenda 2000—Commission Opinion on Estonia's Application for Membership in the European Union, Eur. Comm'n Doc/97/12, at 18 (July 15, 1997), *available at* http://ec.europa.eu/enlargement/archives/pdf/dwn/opinions/estonia/es-op_en.pdf [hereinafter Commission Opinion on Estonia's Application] (noting that "a distinction should accordingly be made between rights and protection attendant on membership of an ethnic and cultural community irrespective of the nationality held, and differences in personal status deriving from the fact of not holding Estonian citizenship").

[172] *Id.*

[173] *See* Dimitry Kochenov, *Pre-Accession, Naturalisation, and "Due Regard to Community Law*," 4 Rom. J. Poli. Sci. 271, 278–86 (2004).

ments stemming from the inclusive definition of minorities for the purposes of the pre-accession assessment. Consequently, this approach, although beautiful on paper, only brought meager results, leaving much to be desired.

Although not resulting in any sweeping changes, the Commission's move was, legally speaking, significant because for the first time, the candidate countries' naturalization policies were influenced by EU pre-accession pressure, which has only limited powers in this domain.[174] In any other context, the Member States are free (albeit without discrimination between those falling within the scope of their citizenship once it has been outlined,[175] and with "due regard to Community Law")[176] to decide who their citizens are.[177] Thus, starting in 1997 the Commission adopted a "realistic" or "inclusive" approach to the assessment of minority protection in these candidate countries.[178]

The Opinions on the Application for Membership released by the Commission on July 15, 1997 enable one to assess the scope of the problem. According to the Estonian Opinion, "Around 35% of the population of Estonia consists of minorities, including non-citizens. . . . Of that 35%, a group of 23% (numbering around 335,000, mainly of Russian origin) are not Estonian citizens."[179] The Latvian Opinion states that "[i]n Latvia, minorities, including non-citizens, account for nearly 44% of the population. . . . Latvians are a minority in 7 of the country's 8 largest towns. Within that 44%, 28% of the population, *i.e.* some 685,000 people, does not have Latvian citizenship and a large propor-

---

[174] *See* Karolina Rostek & Gareth Davies, *The Impact of European Citizenship on National Citizenship Policies*, 10 EUR. INTEGRATION ONLINE PAPERS 5 (2006), http://eiop.or.at/eiop/index.php/eiop (giving general overview of how European Union influences national citizenship policies).

[175] *See* Case C-300/04, Eman en Sevinger v. College van burgemeester en wethouders van Den Haag, 2006 E.C.R. I–8055.

[176] Case C-369/90, Micheletti v. Delegación del Gobierno en Cantabria, 1992 E.C.R. I-4239.

[177] Declarations on this matter were made by Germany (attached to the EEC Treaty) and by the United Kingdom (attached first to the 1972 Treaty of Accession by the United Kingdom to the European Communities and, later, in light of a new Nationality Act, the United Kingdom made a new declaration on the definition of the term "nationals" on January 28, 1983). *See* Case C-192/99, The Queen v. Sec'y of State for the Home Dep't. *ex parte* Kaur, 2001 E.C.R. I-1237. For an overview, see Stephen Hall, *Determining the Scope* ratione personae *of European Citizenship: Customary International Law Prevails for Now*, 28 LEGAL ISSUES OF ECON. INTEGRATION 355 (2001) (commenting on the *Kaur* case).

[178] The Commission explicitly recognized the importance of the problem as early as 1994. *See Communication from the Commission to the Council, Orientations for a Union Approach Towards the Baltic Sea Region*, at 3, COM (1994) 1747 final (Oct. 25, 1994).

[179] Commission Opinion on Estonia's Application, *supra* note 171, at 18.

tion of that group, consisting of the former citizens of the USSR, has no citizenship at all."[180] To summarize, in its assessment of nationality policies, the Commission dealt with the legal status of over one million people, making up a considerable share of the population of the candidate countries belonging to the second group.

The candidate countries themselves considered the persons in possession of foreign or no nationality as not being part of the minority population.[181] Consequently, applying this logic to Latvia and Estonia, the Copenhagen criterion of "respect for and protection of minorities" was not applicable to the situation of these people and, as a result, could not affect the Latvian and Estonian applications for EU membership. One illustration of this point is Estonia's definition of "minority" during ratification of the CoE's Framework Convention.[182] The Estonian government declared that:

> Estonia understands the term "national minorities" as follows—*Citizens of Estonia* that
>
> (a) reside on the territory of Estonia;
>
> (b) maintain longstanding, firm and lasting ties with Estonia;
>
> (c) are distinct from Estonians based on their ethnic, cultural, religious or linguistic characteristics;
>
> (d) are motivated by a concern to preserve together their cultural traditions, their religion or their language, which constitute the basis of their common identity.[183]

The Commission dismissed such a citizenship-centered definition as "not relevant."[184]

The Commission applied the inclusive vision of minorities only to Latvia and Estonia. The first group of countries was analyzed based on the assumption that persons belonging to a minority hold a nationality of the state in which they reside. To illustrate a difference between the two approaches to minority definition, consider the Czech definition of

---

[180] Commission Opinion on Latvia's Application, *supra* note 170, at 18.

[181] *See infra* text accompanying notes 183 & 185.

[182] *See generally* Framework Convention, *supra* note 39.

[183] *See* Estonia, Framework Convention Country Specific Information, http://www.coe.int/t/e/human_rights/minorities/Country_specific_eng.asp#P429_22520 (last visited Jan. 17, 2008) (emphasis added). Estonia ratified the Convention on January 6, 1997. *Id.* These declarations are not new—Germany and Luxembourg, for example, made similar declarations while signing the Convention. *See generally id.* (containing information on all declarations made by States at ratification).

[184] Commission Opinion on Estonia's Application, *supra* note 171, at 18.

minorities, cited by the Commission. The Czech Law on the Rights of National Minorities defined minorities as "a group of *citizens* of the Czech Republic living on the current territory of the Czech Republic that differentiate themselves from the rest of the citizens, and though their ethnic, linguistic and cultural origin, create a minority that at the same time wish to be considered a minority."[185] The Commission, moreover, actively participated in the drafting of minority protection legislation in the Czech Republic (a pre-accession advisor participated in the drafting process as part of the twining program).[186] Thus, the Commission knowingly approved of such a definition. This definition is also used in the law of the CoE, thus, influencing the legal systems of all European states.[187] It has been noted that such an approach is probably not in line with ECJ case law,[188] which grants a possibility to benefit from the minority protection norms adopted by a Member State not only to citizens, but also to residents[189] and visitors (as long as they are EU citizens or long term residents in the sense of Directive 2003/109/EC of course).[190]

In other words, the Commission asserted its right to apply the Copenhagen minority protection criterion to both citizens and foreigners (or stateless persons) residing in the candidate countries *only* while dealing with Estonia and Latvia. It is notable that there is no principal consensus in the scholarly literature on the topic concerning the notion of minority or the necessity of a link between minority status and citizenship.[191] Although it is often argued that citizenship is a necessary precondition to recognition as a minority,[192] many scholars disagree.[193]

---

[185] Comm'n of the Eur. Cmtys., Regular Report on the Czech Republic's Progress Towards Accession, at 25 (2001), *available at* http://ec.europa.eu/enlargement/archives/key_documents/reports_2001_en.htm (emphasis added).

[186] *See* Mahulena Hofmann, *The 2001 Law on National Minorities of the Czech Republic*, 1 EUR. Y.B. OF MINORITY ISSUES 623, 624 (2001).

[187] John R. Valentine, *Towards a Definition of National Minority*, 32 DENVER J. INT'L L. & POLICY 445, 460–66 (2004).

[188] *See* Wiener & Schwellnus, *supra* note 12, at 33. For general information on the principle of nondiscrimination based on nationality in EC law, see generally GARETH DAVIES, NATIONALITY DISCRIMINATION IN THE EUROPEAN INTERNAL MARKET (2003).

[189] *See* Case 137/84, Ministère Public v. Mutsch, 1985 E.C.R. 2681.

[190] *See Bickel & Franz*, 1998 E.C.R. I-07637, ¶ 31.

[191] *See* Carmen Thiele, *The Criterion of Citizenship for Minorities: The Example of Estonia* 1 (Eur. Ctr. for Minority Issues, Working Paper No. 5, 1999), *available at* http://www.ecmi.de/download/working_paper_5.pdf; *see also* PENTASSUGLIA, *supra* note 31, passim.

[192] *See* U.N. Econ. & Soc. Council [ECOSOC], Sub-Comm. on Prevention of Discrimination & Prot. of Minorities, *Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities* ¶ 569, U.N. Doc. E/CN.4/Sub.2/384/Rev.1 (1979) (*prepared by* Francesco Capo-

Likewise, it is impossible to find a clear solution to this problem in the main international legal instruments. One commentator notes that the Human Rights Committee established by article 28 of the ICCPR recognized that "all members of an ethnic, religious or linguistic minority are granted minority rights, no matter whether they possess the citizenship of the state or not."[194] Neither does the Framework Convention contain any reference to citizenship. This does not help because it does not contain any definition of minority, which would prove that citizenship is not among the necessary requirements to be treated as a minority. The PCIJ did not include a citizenship requirement in its minority definition.[195] The European Charter for Regional and Minority Languages, on the other hand, contains an explicit citizenship requirement for minorities.[196] Overall, "The European regional system considers citizenship as a necessary precondition for membership of a legally protected minority."[197] From this standpoint, the Estonian Declaration attaching minority status to the citizenship of Estonia is in the mainstream of legal development in the field of legal definition of minorities, which makes the Commission's position almost revolutionary.

Notwithstanding the innovative nature of the Commission's move toward an inclusive approach to minority definition, the new understanding of who should qualify as a minority in Estonia and Latvia clearly did not change the approach toward minorities adopted in these particular countries. The 2002 Estonian Report underlined that Estonia gave too narrow a definition to minorities,[198] adding, however, that Estonia adopted a more inclusive approach in practice.[199] Moreover, such a discrepancy in the definition of who is a minority within

---

torti); Jules Deschêne, *Proposal Concerning a Definition of the Term "Minority,"* ¶¶ 25–28, U.N. Doc. E/CN.4/Sub.2/1985/31 (May 4, 1985); Wiener & Schwellnus, *supra* note 12, at 8; Thiele, *supra* note 191, at 2–3.

[193] *See* Manfred Nowak, U.N. Covenant on Civil and Political Rights: CCPR Commentary 488–89 (1993); Thiele, *supra* note 191, at 3; Christian Tomuschat, *Protection of Minorities under Article 27 of the International Covenant on Civil and Political Rights, in Bernhardt, in* Völkerrecht als Rechtsordnung, Internationale Gerichtsbarkeit, Menschenrechte 961 (Bernhardt Rudolf et al.. eds., 1983).

[194] *See* U.N. Human Rts. Comm'n, *General Comment No.23(50) on Article 27/Minority Rights*, ¶ 5.1, U.N. Doc. CCPR/C/21/Rev. 1/Add. 5 (Apr. 26, 1994); Thiele, *supra* note 191, at 3.

[195] *See* The Greco-Bulgarian "Communities," 1930 P.C.I.J. (ser. B) No. 17 (July 31, 1930).

[196] European Charter for Regional and Minority Languages, *supra* note 40, art. 1(a)(i).

[197] *See* Petra Roter, *Managing the 'Minority Problem' in the Post—Cold War Europe Within the Framework of a Multilayered Regime for the Protection of National Minorities*, 1 Eur. Y.B. of Minority Issues 85, 106 (2001); Thiele, *supra* note 191, at 21.

[198] Comm'n of the Eur. Cmtys., Regular Report on Estonia's Progress Towards Accession (SEC 2002) 1402, at 30–31 (Oct. 9, 2002).

[199] *Id.* at 31 n.8.

the scope of the Copenhagen political criteria demonstrated clearly that no single approach was used by the Commission during the pre-accession monitoring exercise. This, yet again, undermined the pre-accession rhetoric of a single and fair standard equally applicable to all candidate countries.

As Chief Justice Earl Warren famously stated in *Perez v. Brownell,* "Citizenship is man's basic right, for it is nothing less than the right to have rights."[200] In the context of the Russian speaking minority in Latvia and Estonia, the problem of statelessness is aggravated by the fact that, by having a stateless status, huge portions of the population of these states are *de facto* prevented from acquiring the nationality of the Baltic States in question and EU citizenship, derivative thereof, by virtue of strict ethnocentric policy of the states belonging to the second group. Low naturalization rates in the second group (particularly Latvia) are telling in this regard,[201] inviting speculation about ineffective and discriminatory policy choices in these countries. To claim certain limited community rights, members of minority groups, unless they are family members of Community citizens, can only rely on Directive 2003/109/EC.[202]

D. *Different Approaches to Minority Education in the Two Groups*

Putting the fight for school desegregation aside (which is too complicated an issue for this Article)[203] the Commission's approach to education of minorities is also inconsistent. Although one minority should have a university, other minorities lose their rights to schooling in their language.[204] In the context of the "Russian-speaking" mi-

---

[200] Perez v. Brownell, 356 U.S. 44, 64 (1958) (Warren, C.J., dissenting).

[201] *See* Hughes, *supra* note 146, 751 (providing statistics on naturalization rates).

[202] *See* Council Directive 2003/109, Concerning the Status of Third-Country Nationals who are Long-Term Residents, 2003 O.J. (L 16) 44.

[203] Especially given the recent controversial case law of the Strausbourg human rights protection system on this issue. *See* D.H. et al. v. The Czech Republic, Eur. Ct. H.R., App. No. 57325/00 (2006). For a discussion of this case, see generally Claude Cahn, *The Elephant in the Room: On Not Tackling Systemic Racial Discrimination at the European Court of Human Rights*, 4 Eur. Anti-Discrimination L. Rev. 13 (2006), *available at* http://ec. europa.eu/employment_social/fundamental_rights/pdf/legnet/06lawrev4_en.pdf.

[204] *See, e.g.*, Jack Greenberg, *Brown v. Board of Education: An Axe in the Frozen Sea of Racism*, 48 St. Louis U. L.J. 869, 869–88(2004) (comparing school desegregation in Eastern Europe and the United States); Matthew D. Marden, *Return to Europe? The Czech Republic and the EU's Influence on Its Treatment of Roma*, 37 Vand. J. Transnat'l L. 1181, 1194–96 (2004); Eur. Roma Rts. Ctr., A Special Remedy: Roma and Schools for the Mentally Handicapped in the Czech Republic, Country Rpts. Series No. 8 (1999), *available at* http://www.errc.org; Press Release,

norities, *de facto* assimilation is stressed, while the Commission's principles concerning the Hungarian minority are absolutely different.[205]

The Commission followed the developments related to the amendment of the Law on Education in Romania to create a Hungarian-German University.[206] This university was not supposed to become the only institution of higher education in Romania operating in minority languages because Hungarian is used at a number of departments of state universities in that country.[207]

The developments in Latvia and Estonia reveal that the prohibition or limitation of teaching in the minority language is considered an organic part of the promotion of the state language. In Estonia, Russian schools get State funding.[208] The Law on Basic and Upper Secondary Schools, however, only allows for forty percent of teaching to be done in a language other than Estonian starting in 2007,[209] which is clearly contrary to the Commission's position in the Opinion on the Estonian Application for EU Membership. There, the Commission recommended that education in Russian language "should be maintained without time limit in the future."[210] Latvian education law insists that all minority schools choose a bilingual program.[211] Minority school teachers not proficient in Latvian are subject to dismissal.[212] According to the 2000 Latvian Report, by 2004 "all state funded schools will provide sec-

---

Eur. Roma Rts. Ctr., Croatian Romani Children Sue at the European Court of Human Rights over Racial Segregation in Schools, *available at* http://www.errc.org.

[205] VAN DER MEULEN, *supra* note 12, at 7.

[206] *See* Comm'n of the Eur. Cmtys., Regular Report on Romania's Progress Towards Accession, at 11–12 (1998), *available at* http://ec.europa.eu/enlargement/archives/key_documents/reports_1998_en.htm. For similar sentiments in all other Romanian Regular Reports, see http://ec.europa.eu/enlargement/key_documents/index_archive_en.htm.

[207] For information regarding schooling in Hungarian in Romania, see Andrei Marga, *Reforming the Postcommunist University*, 8 J. OF DEMOCRACY 159, 159–67 (1997); Mary McIntosh et al., *Minority Rights and Majority Rule: Ethnic Tolerance in Romania and Bulgaria*, 73 SOC. FORCES 939, 942 (1995).

[208] For an account on education in the Russian language in Latvia and Estonia, see Peter Van Elsuwege, *Russian-speaking Minorities in Estonia and Latvia: Problems of Integration at the Threshold of the European Union* 18–23 (Eur. Ctr. For Minority Issues, Working Paper No. 20, 2004) *available at* http://www.ecmi.de/download/working_paper_20.pdf [hereinafter *Russian Speaking Minorities*].

[209] Comm'n of the Eur. Cmtys., Regular Report on Estonia's Progress Towards Accession, at 19 (2000), *available at* http://ec.europa.eu/enlargement/archives/key_documents/reports_2000_en.htm.

[210] Commission Opinion on Estonia's Application, *supra* note 171, at 20.

[211] Comm'n of the Eur. Cmtys., Regular Report on Latvia's Progress Towards Accession, at 18 (1998), *available at* http://ec.europa.eu/enlargement/archives/key_documents/reports_1998_en.htm [hereinafter 1998 Latvian Report].

[212] *Id.*

ondary education (from 10th grade onwards) in the state language only"; thus, the law is effectively prohibiting education in the native language of forty-four percent of the population.[213] Strikingly, in response to this development the Commission stated that "[t]he Language Law and implementing regulations . . . essentially comply with Latvia's international obligations."[214] The Commission's position is difficult to explain, as the approval of the Latvian policy banning Russian language from schools is clearly contrary to the Commission's minority protection guidelines for the first group of countries, in which education in the minority language is supported and safeguarded. Scholars regret that "under the present situation there seem to be no clear grounds to obstruct the implementation of the Latvian Education Law."[215]

Although the Commission supported Hungarians in Romania schooled in Hungarian in establishing a university in their own language, the Russian minority schools in the second group of countries are being closed; the Commission did not take issue with this during pre-accession.

E. *Different Approaches to Nondiscrimination on the Grounds of Belonging to a Minority in the Two Groups*

In the first group of countries, unlike in the second, the Commission was attentive to minority representation in Government and the police, as well as to the organization of minority self-government. Importantly, minority participation, as promoted by the Commission during the pre-accession process, was intended to reach up the hierarchy of army and administrative personnel.[216]

The Commission also monitored with great care access to the labor market in general, especially regarding discrimination concerning the Roma minority. Notwithstanding the efforts of the Commission and the countries of the first group, *de facto* discrimination flourished.[217]

---

[213] Comm'n of the Eur. Cmtys., Regular Report on Latvia's Progress Towards Accession, at 22–23 (2000), *available at* http://ec.europa.eu/enlargement/archives/key_documents/reports_2000_en.htm [hereinafter 2000 Latvian Report].

[214] *Id.* at 97.

[215] *See Russian Speaking Minorities*, *supra* note 208, at 15.

[216] Comm'n of the Eur. Cmtys., Regular Report on Bulgaria's Progress Towards Accession, at 22 (2000), *available at* http://ec.europa.eu/enlargement/archives/key_documents/reports_2000_en.htm [hereinafter 2000 Bulgarian Report].

[217] *See, e.g.*, Comm'n of the Eur. Cmtys., Regular Report on Hungary's Progress Towards Accession, at 15 (1999), *available at* http://ec.europa.eu/enlargement/archives/key_documents/reports_1999_en.htm.

A different situation arose in the context of promoting nondiscrimination in the second group of countries. Judging by the Commission's Reports and Opinions it is possible to conclude that the Commission only regarded the Russian minority in Latvia and Estonia as a linguistic minority. In the course of the pre-accession process, the Commission gave overwhelming priority to the measures related to teaching minorities Latvian and Estonian.[218] All the Accession Partnerships focused on the same issue and the PHARE funding was used for the program.[219] Thus, language teaching seems to be regarded, by the States of the second group and the Commission, as the main tool of integration and promotion of nondiscrimination.

Viewed from a legal perspective, such an approach is problematic because the Commission, in its Reports, does not draw a line between integration and assimilation, and arguably supports the complete assimilation of the Russian minority, which is clearly a state policy in the two Baltic States. Such a policy contradicts article 5(2) of the Framework Convention for the Protection of Minorities, which states that "the Parties shall refrain from policies or practices aimed at assimilation of persons belonging to national minorities against their will and shall protect these persons from any action aimed at such assimilation."[220]

But what is most striking is that the Commission, on a number of occasions, simply refused to acknowledge that there were problems concerning treatment of the Russian-speaking minority, unreservedly taking the side of the two Baltic States. It is as if the Commission "participates in a national conspiracy of silence, [like some Estonians and Latvians who] simply seem to refuse to acknowledge that the Russian minority may have legitimate complaints."[221] All reports dealing with Latvian and Estonian preparation for accession, state that the rights of the Russian-speaking minority, with or without Estonian or Latvian nationality, continue to be observed and safeguarded.[222] In fact, this stan-

---

[218] Marc Maresceau, *Quelques réflexions sur l'origine et l'application de principes fondamentaux dans la stratégie d'adhésion de l'Union européenne*, *in* Le driot de l'Union européenne en principes 91–93 (2006) [hereinafter *Quelques réflexions*].

[219] *Id.* at 92–93.

[220] Framework Convention, *supra* note 39, art. 5(2).

[221] Richard C. Visek, *Creating the Ethnic Electorate through Legal Restorationism: Citizenship Rights in Estonia*, 38 Harv. Int'l L.J. 315, 357 (1997).

[222] *See* Comm'n of the Eur. Cmtys., Regular Report on Estonia's Progress Towards Accession, at 11 (1998), *available at* http://ec.europa.eu/enlargement/archives/key_documents/reports_1998_en.htm; 1998 Latvian Report, *supra* note 211, at 13.

dard was set in 1997 by Agenda 2000, which did not find any "evidence that [Russian-speaking] minorities are subject to discrimination."[223]

In other words, according to the Commission, there is basically no minority problem in the two Baltic States and thus no discrimination. Ironically, the Commission returned to the issue of minority discrimination in later regular reports, mostly addressing discrimination arising from the absence of nationality, having a "non state language" as a mother tongue and related to the use of the minority language, social security, education, work, and political representation.[224] The far-reaching nature of the institutionalized discrimination based on belonging to a minority in place in Latvia and Estonia received extensive coverage in academic literature.[225] Researchers' findings are in clear contradiction with the Commission's claims.

F. *Different Approaches to Minority Self-Government and Political Rights of Minorities in the Two Groups*

Another important issue that arose during preparation for the fifth enlargement concerned the adaptation of the candidate countries' political systems to better accommodate minority needs. The Commission's demands to change legislation went as high as the candidate countries' constitutional level. In Bulgaria, for example, considering the Constitutional prohibition to form political parties around ethnic, religious or racial lines, the Commission found that "[i]t could be desirable to clarify these Constitutional provisions about the restrictions on the establishment of the political parties."[226]

Although a number of minorities in the first group of countries benefited from the possibility of forming political parties, using their language in communication with the authorities, and the grant of a share of self-government (whether for Hungarians in Romania or the Roma in Hungary), the Russian minority in the second group was again treated differently. The difference in treatment was largely caused by the stateless status of a huge number of individuals among the Russians in Latvia and Estonia.

Generally speaking, it is clear that "the inability of nearly one third of the population of these states to participate in elections (which is a

---

[223] *See* Comm'n of the Eur. Cmtys., Agenda 2000: For a Stronger and Wider Europe, *Bulletin of the European Union, Supplement 5/97* (1997).

[224] *See generally* Estonian & Latvian Reports, *available at* http://ec.europa.eu/enlargement/key_documents/index_archive_en.htm.

[225] *See* sources cited *supra* note 138.

[226] 2000 Bulgarian Report, *supra* note 216, at 22.

reality, albeit to a different extent, in Latvia and Estonia) is hardly in line with norms established by western democracies."[227] Latvian and Estonian non-citizens cannot vote in national elections or be members of political parties.[228] This has been criticized by the U.N. Human Rights Committee,[229] the CoE and the OSCE, but not by the Commission.[230]

Even those possessing citizenship of the state in which they reside face enormous obstacles if they try to participate in political life. The Commission did little to change the situation. According to Latvian law, candidates running for office, even if Latvian citizens, had to produce a language proficiency certificate.[231] Latvia lost a case in the European Court of Human Rights (Eur. Ct. H.R.)[232] and proceedings in front of the U.N. Human Rights Committee[233] in relation to this requirement. The Eur. Ct. H.R. case *Podkolzina* v. *Latvia* involved a Latvian of Russian descent who was not allowed to run for office although she possessed a language proficiency certificate of the highest third level on the grounds that she failed a "linguistic check," administered at her work place by a special officer without prior notification. In 2002, the Eur. Ct. H.R. found that Latvia violated the claimant's right to free elections, at the same time recognizing the importance of the legislation in force, which pleased the Commission.[234] Indeed, the court stated that "requiring a candidate for election to the national parliament to have sufficient knowledge of the official language pursues a legitimate aim."[235]

---

[227] Hanneman, *supra* note 138, at 519; *see also* Alfred Stepan, *Kogda logika demokratii protivorechit logike natzional'nogo gosudarstva*, 3 Rossijskij biulleten' po pravam cheloveka 100 (1995), *available at* http://www.hrights.ru/text/b3/bul3.htm.

[228] For a discussion of political participation of non-citizens in Baltic states, see Jo Shaw, The Transformation of Citizenship in the European Union: Electoral Rights and the Restructuring of Political Landscape 329–43 (2007).

[229] U.N. Human Rts. Comm'n, *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant*, CCPR/CO/79/LVA, § 18 (Dec. 1, 2003).

[230] This author's review of all relevant Copenhagen-related documents released by the Commission revealed no such criticism.

[231] Podkolzina v. Latvia, 2002-II Eur. Ct. H.R. 443, § 1 (2002).

[232] *See id*. For a discussion of this case, see generally Frank Hoffmeister, *Podkolzina v. Latvia*, 97 Am. J. Int'l L 664 (2003); Caroline Taube, *Latvia: Political Participation of Linguistic Minorities*, 1 Int'l J. Const. L. 511, 513–15 (2003).

[233] U.N. Human Rts. Comm'n, *Views of the Human Rights Committee under Article 5, Para. 4 of the Optional Protocol to the Covenant Concerning Comm.*, U.N. Doc. CCPR/C/ 72/D/884/1999 (July 31, 2001).

[234] Comm'n of the Eur. Cmtys., Regular Report on Latvia's Progress Towards Accession (SEC 2002) 1402, at 34 (Oct. 9, 2002) [hereinafter 2002 Latvian Report].

[235] *See Podkolzina,* 2002-II Eur. Ct. H.R., ¶ 34.

Soon after the *Podkolzina* case was decided, the Latvian Parliament amended the relevant legislation, lifting the linguistic proficiency requirements for candidates in national and local elections, which the Commission welcomed.[236] Interestingly, the amendment came right before the North Atlantic Treaty Organization (NATO) summit in Reykjavik in May 2002, which was supposed to discuss *inter alia* the Latvian application for membership in the organization.[237] Such a coincidence made scholars suspect that the law was actually amended "for the NATO."[238] Indeed, the Commission, well aware of the practices of arbitrary linguistic checks of Latvian citizens belonging to a minority willing to run for office, did not take any measures to make Latvia reconsider its policy.

The majority of Russians in the second group of countries remain largely excluded from political life because of their stateless status. In other words, the citizenship legislation (or the lack thereof)[239] was used in those countries to create ethnic electorates,[240] which does not comport with the democratic principles of inclusion and nondiscrimination.

G. *Different Approaches to International Minority Protection Instruments in the Two Groups*

Although Estonia at least ratified some international minority protection instruments by the time of its EU accession, the same cannot be said of Latvia. The Commission has been stressing the importance of Latvian ratification of the Framework Convention for the Protection of Minorities throughout the reporting exercise, starting with the Opinion on the Latvian Application for EU Membership.[241] By the time the last Report (structurally based on the Copenhagen criteria) was released, the Convention *still* was not ratified. The delays, which eventually re-

---

[236] 2002 Latvian Report, *supra* note 234, at 33.

[237] Hoffmeister, *supra* note 232, at 668.

[238] If the amendment was not passed expressly for NATO, the proximity of the summit sheds light on the seventy-five percent majority achieved in Parliament at the ratification of the amendments—a fact also noted by the Commission. *See id*; Taube, *supra* note 232, at 514–15.

[239] Latvia did not have a citizenship law for some time, thus making naturalizations legally impossible. *See* Il'ja Kudriavtzev, *Latvija: cherez skol'ko let budet grazhdanstvo?*, 3 Rossijskij biulleten' po pravam cheloveka 96 (1994), *available at* http://www. hrights.ru/text/b3/bul3.htm.

[240] *See* Visek, *supra* note 221, at 354; Stepan, *supra* note 227, at 100–09.

[241] 2002 Latvian Report, *supra* note 234, at 30.

sulted in non-accession to the Convention, did not hamper Latvian prospects of joining the European Union.[242]

H. *Analysis of the Commission's Approach*

From the examples mentioned above it is clear that the Commission's approach *vis-à-vis* minorities in each of the two groups of countries was not uniform. In fact, all the steps of the pre-accession assessment and the application of the principle of conditionality were *de facto* built along two different lines. The choice of a minority-protection standard to be promoted depended on the country (whether within the first or second group) and minority in question. The first standard was vaguely built around the approach to minority protection in the CoE documents and was applied in the context of the first group of countries. The second standard, built around the practices of tolerating exclusion and forced assimilation (deemed illegal by CoE minority protection documents) was applied to minorities in the second group.

Such a discrepancy between the two approaches taken by the Commission is nothing short of a disaster for the application of the conditionality principle in this field.[243] Moreover, given the similarities between the practices espoused by the second group of countries during the pre-accession process, the Commission's logic of conditionality becomes even more impenetrable with regard to the choice of countries with which to open negotiations. It is impossible to find any consistent explanation as to why the negotiations with Estonia have been opened before Latvia.

It is difficult to disagree with Marc Maresceau, who stated that "[t]he true and complete story of this unexpected choice by the Commission will probably never be fully known."[244] The only possible explanation for such a choice is probably geo-political necessity, which has nothing to do with political conditionality.[245] This necessity is the same that likely explains the existence of two pre-accession minority protection standards applied by the Commission during the preparation of the fifth enlargement. Some authors link the EU decision not to include Latvia within the first wave of countries to several events that took

---

[242] Latvia only ratified the Convention in May 2005 with far-reaching derogations. *See* Latvia, Framework Convention Country Specific Information, http://www.coe.int/t/e/human_rights/minorities/Country_specific_eng.asp (last visited Jan. 17, 2008).

[243] KOCHENOV, *supra* note 3, at 308–09 (noting similar disaster in other areas of pre-accession).

[244] Maresceau, *supra* note 6, at 18.

[245] *See* Dorodnova, *supra* note 138, at 9.

place in 1998.[246] These events included a violent dispersion of a demonstration of "Russian-speaking" pensioners in March, the explosion of a bomb in front of the Russian embassy in Riga in April, and a march of the *Waffen SS* veterans in the Latvian capital, attended by a number of senior Latvian military officials.[247] Taken together, these events do not produce a convincing success story on the integration of the Russian minority. Nevertheless, Latvia and Estonia already met the Copenhagen political criteria in 1997, as implied in the Commission's Opinions.[248]

Returning to the standards, the Commission's stance in the field of minority rights is particularly ironic. Minority protection was probably the only area of pre-accession monitoring in which relatively clear standards were actually available, thanks to the CoE.[249] Compared with other areas, in which such standards simply did not exist, and in which the Commission was trying to act as a "myth-maker," playing as if it had such standards at hand (*e.g.*, in judicial independence),[250] the Commission, instead of applying ready-to-use CoE findings, came up with two distinct approaches that contradicted each other and sat uneasily next to the CoE documents. The example of the application of the pre-accession conditionality principle to the requirement of the "protection of and respect for minorities" illustrates the necessity to better cooperate. This is apparent from the relations between the European Union and the CoE (particularly in the context of the preparation of the enlargements of the former).[251]

The approach of the two Baltic States can probably be explained with the concept of "ethnic democracy." Ethnic democracy, a concept formulated in Israel, is understood as "a political system that combines extension of democratic rights for all with institutionalization of dominance by one ethnic group."[252] The use of this Israeli concept in

---

[246] *See* Barrington, *supra* note 168, at 174.

[247] *See id.*

[248] Commission Opinion on Estonian Application, *supra* note 165, at 116; Commission Opinion on Latvia's Application, *supra* note 170, at 114.

[249] *See supra* text accompanying notes 38–42.

[250] *See generally* Daniel Smilov, *EU Enlargement and the Constitutional Principle of Judicial Independence*, *in* Spreading Democracy and the Rule of Law? 313 (Wojciech Sadurski, Adam Czarnota, & Martin Krygier eds., 2006).

[251] Dimitry Kochenov, *An Argument for Closer Cooperation Between the EU and the Council of Europe in the Field of EU Enlargement Regulation*, 2 Croatian Y.B. Eur. L. Pol'y 311, 340–41 (2006).

[252] Priit Järve, *Ethnic Democracy and Estonia: Application of Smooha's Model* 3 (Eur. Ctr. for Minority Issues, Working Paper No. 7, 2000), *available at* http://www.ecmi.de/download/working_paper_7.pdf; *see also* Hughes, *supra* note 146, at 739.

EU Member States "united in diversity"[253] is somewhat dubious. In contrast with the idea of domination implied in the concept, the bases of the European Union are pluralism and tolerance.

What could the Commission do to change the situation in the sphere of minority protection in the countries of the second group? The tools available to the Commission within the framework of the EU conditionality principle and enhanced pre-accession policy,[254] applied during the preparation of candidate countries for EU accession, provided the Commission with a wide range of options for solving the statelessness crisis in Latvia and Estonia. This allowed unification of the two contradicting approaches it applied during preparation for the fifth enlargement. Moreover, as follows from other areas of the pre-accession reform, these tools could be used in a flexible way to ensure better compliance, without bluntly dictating to candidate countries the kind of policies they are expected to adopt.[255]

At least three options were available to the Commission:

> 1. To challenge discrimination on the grounds of the non-possession of a citizenship status by the residents of Latvia and Estonia;
> 2. To promote milder conditions for naturalization; or
> 3. To attack the citizenship policies of Latvia and Estonia directly, which would have resulted in minority acquisition of citizenship and thus the elimination of the most severe forms of discrimination.

The Commission had two main tools with which to pursue these developments. First, it had the *Micheletti v. Delegación del Gobierno en Cantabria* reference to the importance of a due regard of Community Law while granting citizenship.[256] The second builds on the assumption that "external pressure can be a powerful force for change."[257] Most notable

---

[253] *See* Gabriel von Toggenburg, *Unification via Diversification—What Does It Mean to Be "United in Diversity"?* 1, 12 (2004), *available at* http://www.eumap.org/journal/features/2004/bigday/diversity.

[254] *See* Kochenov, *supra* note 11, at 7.

[255] Dimitry Kochenov, *EU Enlargement: Flexible Compliance with the Commission's Pre-Accession Demands and Schnittke's Ideas on Music* 4–11 (Ctr. for the Study of Eur. Politics & Soc'y, Working Paper No. 2, 2006), *available at* http://papers.ssrn.com/sol3/papers.cfm? abstract _id=926854.

[256] Kochenov, *supra* note 173, at 87 (noting that Commission actually tried to use this tool, albeit in a shy manner, consequently bringing minimal results).

[257] *See* Rachel Gulielmo, *Human Rights in the Accession Process*, *in* Enlarged European Union, *supra* note 12, at 37, 48.

within this second category, the European Union could have made effective use of the Accession Partnerships, which allows the halting of pre-accession financial assistance in cases of non-compliance[258] and enables the Commission to go as far as freezing accession talks. Scholarly literature and the tools available to the European Union within the auspices of the pre-accession strategy, make clear that the European Union was in a privileged position to monitor and influence the minority situation in Estonia and Latvia.[259]

While dealing with the first group of countries, unlike the second, the Commission used the third approach outlined above: the constructive critique of the grounds of naturalization. The issue was resolved quickly.[260] It concerned the citizenship law of the Czech Republic, drafted to exclude the possibility of the Roma acquiring Czech citizenship.[261] The Commission found that the approach taken by the Czech Republic (especially the need to provide evidence of clean criminal record for five years) was inadmissible and contrary to the succession rule. It thus demanded that the candidate country alter its naturalization policy, including the *grounds* for naturalization as included in the Czech law No. 40/1993 *Sb.*,[262] something that had never happened in the context of reporting of Latvian or Estonian progress toward accession.[263]

Strikingly, all the international organizations and a great majority of scholars working on the minority protection issue in the two Baltic States do not discuss the legitimacy of the naturalization policy the two

---

[258] Council Regulation 622/98 art. 4, 1998 O.J. (L 85) 1 (introducing Accession Partnerships and making receipt of pre-accession aid conditional on pre-accession progress); *see also* Alain Guggenbühl & Margareta Theelen, *The Financial Assistance of the EU to its Eastern and Southern Neighbours: A Comparative Analysis, in* The EU's Enlargement and Mediterranean Strategies, *supra* note 6, at 217.

[259] *See Russian Speaking Minorities*, *supra* note 208, at 17.

[260] *See generally* Dimitry Kochenov, *EU Influence on the Citizenship Policies of the Candidate Countries: The Case of the Roma Exclusion in the Czech Republic*, 3 J. Contemp. Eur. Res. 124 (2007).

[261] *See id.* (providing analysis of this case).

[262] *See* Banach, *supra* note 2, at 377; Marden, *supra* note 204, at 1188; Jirina Siklova & Marta Miklusakova, *Denying Citizenship to the Czech Roma*, 7 E. Eur. Const. L. Rev. 2, 58–64 (1998); Adam M. Warnke, *Vagabonds, Tinkers, and Travelers: Statelessness Among the East European Roma*, 7 Ind. J. Global Legal Stud. 335, 356–58 (1999); *see also* Viktor Dobal et al., *Report on the Situation of the Romani Community in the Czech Republic*, 1999, *available at* http://www.cts.cuni.cz/~dobal/report/index.htm (investigating denial of citizenship to ethnic Roma in Czech Republic and successful role of international organizations, including European Union in addressing issue).

[263] Kochenov, *supra* note 260, at 138–40 (comparing Commission's involvement with statelessness issues in Czech Republic with similar issues in Latvia and Estonia).

countries applied. An important exception is the position of Ferdinand de Varennes, who is among the few to question the legitimacy of linguistic proficiency requirements in those countries.[264] "The exclusive preference given to Latvian and Estonian seems disproportionate and unreasonable as an attempt to rectify past Soviet practices, bearing in mind the number of permanent residents born in Estonia and Latvia but not of Estonian or Latvian 'ethnic origin.'"[265] It is notable that international legal practice recognizes the application of the principle of nondiscrimination in the acquisition of citizenship.[266] Citing a dissenting opinion of Judge Rodolfo E. Piza in a Costa-Rican naturalization case of the Inter-American Court, de Varennes makes a convincing argument that "a reasonable and nondiscriminatory naturalization policy must reflect, in a balanced way, the population of a state. It cannot operate in disregard of the languages *actually used* in the country."[267] Unfortunately, neither the Council nor the CoE supported this approach.

Conclusion: Too Many Paradoxes

As this Article demonstrates, the web of minority protection standards in Europe is sophisticated. Not only are there CoE standards on the one hand and EU standards on the other, but EU standards are split into internal and external groups. The latter are broader in scope, while the former are hardly articulated. Despite such a split, it remains clear that it is still possible for the European Union to develop a meaningful internal minority protection standard in the future, once there is better consensus regarding this issue among the *Herren der Verträge*.

None of the available minority protection standards are uniform: their duality is inherent, corresponding to two levels of minority protection. This includes nondiscrimination based on belonging to a minority on the one hand, and minority protection *per se* on the other (*e.g.*, special rights for minorities). Not all the above standards cover both elements of such an "ideal" tandem. Although the CoE instruments allow talking about an inclusive approach, it is nevertheless clear that the nondiscrimination element of the CoE standard is better articulated,

---

[264] *See* de Varennes, *supra* note 166, at 136–42.

[265] *Id.* at 137. Maresceau made a similar point. *Quelques réflexions*, *supra* note 218, at 89–95.

[266] Report of the Human Rights Commission., General Comment No.18, U.N. GAOR, 45th Sess., Supp. No.40, U.N. Doc. A/45/40, ¶¶ 7–8 (Oct. 4, 1990).

[267] *See* de Varennes, *supra* note 166, at 135 (quoting Proposed Amendments to the Naturalisation Provisions of the Constitution of Costa Rica, Advisory Opinion OC-4/84, Inter–Am. C.H.R. Report (ser. A) No. 4 (Jan. 19, 1984)) (emphasis added).

being inscribed in the ECHR, than is the group-rights element. This is so because the latter is mostly rooted in the documents of nonbinding nature, such as the Framework Convention. Viewed from the perspective of this duality, also reflected in academic literature and PCIJ case law, the EU approach to internal minority protection is almost totally confined to nondiscrimination and says little on the group rights issue. Moving one level of governance lower, it is clear that any more or less uniform approach to minority protection issues among the Member States is missing. Group rights are *de jure* illegal in some Member States (*e.g.*, France)[268] and taken to extremes in others (*e.g.*, Belgium).[269] The last enlargement only added to the array of national approaches to minority protection, making it even more uncertain that the European Union as a whole might move in the direction of articulated supranational minority protection.

The picture gains complexity once one analyzes the external aspects of EU minority rights. Historically, the European Union has used a number of different approaches to minority rights in external relations and during the preparation of enlargements. In enlargement law, the EU path has mostly been confined to total or partial exclusion of the territories with minority population from the scope of application of Community Law. The application of such a standard, however, has not always been beneficial to the minorities concerned because the scope of their Community Law rights becomes significantly narrower than that of other EU citizens. Also, in respect to islands and specific territories or communities, the standard is hardly useful in situations in which minority populations are intermingled with the majority. Taken together, both these considerations explain the reluctance to apply such a standard during the preparation of the fifth enlargement.

This reluctance, however, did not make the pre-accession process easier. Having no internal minority protection tradition, the European Union nevertheless made minority protection one of the pre-accession criteria to be met by the candidate countries. Claiming to apply a single standard in judging all applicants, which was a must in light of the pre-accession principle of conditionality, the European Union stopped short of creating a minority protection standard to be exported. Moreover, as this Article has explained, it even failed to apply similar standards of minority protection to all candidate countries,

---

[268] *See* CC decision no. 99–412DC, *available at* http://www.conseil-constitutionnel.fr/decision/1999/99412/99412dc.htm; *see also* Hoffmeister, *supra* note 45, at 89–90.

[269] *See, e.g.*, Belgian Linguistics Case, 6 Eur. Ct. H.R. (ser. A) (1968).

instead applying two contradictory standards. The first standard, mostly rooted in CoE documents and applied in the context of the pre-accession assessment of the majority of the candidate countries, was drastically different from the second standard, which was applied in the context of Latvian and Estonian pre-accession progress, and will soon be contrary to law once the CoE benchmarks are applied. Defining minorities differently and adopting different approaches to minority self-governance, political participation, education and other issues, the two approaches contradict each other and hardly overlap. Generally speaking, one can state that while the Commission is clearly on the side of the minorities with respect to the first group of countries, the Commission takes the side of the candidate countries with respect to the second, turning a blind eye to Latvia and Estonia's "undoubtedly intentional"[270] policy of exclusion.

Such a vision of the promotion of minority protection in the candidate countries amounts to a disaster for the principle of conditionality. It demonstrates that there was no fair, merit-based assessment of candidate countries based on the same standards (presupposed by the principle). Dividing the candidate countries into two groups allows discovering some standards behind this "*ad-hocism* and inconsistency."[271] Still, the fact that there are at least two standards certainly plays *against* the Commission because this is precisely what the principle of conditionality was supposed to avoid.[272]

The whole story of minority protection standard-setting in the European Union is that of numerous fictions and contradictions. The internal standards are weak and poorly articulated, the Member States' national standards are contradictory, and the external standards are numerous and poorly aligned. There is little or no order in this construction.

The current state of EU standard-setting in the field of minority rights has far-reaching negative implications on the development of a consistent system of EU minority protection in the future. A number of painful choices will have to be made to alter this situation. Most importantly, the European Union's internal standard has to be made more

---

[270] *See* Blackman, *supra* note 169, at 1189 n.163.

[271] Gwendolyn Sasse, *Minority Rights and EU Enlargement: Normative Overstretch or Effective Conditionality?*, *in* ENLARGED EUROPEAN UNION, *supra* note 12, at 69.

[272] According to the Luxembourg European Council, the candidate countries were "destined to join the Union on the basis of the same criteria . . . on an equal footing." Presidency Conclusions, Luxembourg European Council ¶ 10 (Dec. 12–13, 1997).

inclusive and uniform, while the European Union simply needs to create an external standard.

Both developments are likely to gain importance in the near future. After the incorporation of Central and Eastern European countries, the enlarged European Union is likely to face more minority-related problems than in the past, thus the need to effectively tackle them internally, both at the Member State and Community level. To make this work, a clear system of rules, which is missing at present, is indispensable. Also, to ensure smooth EU enlargement in the future, a uniform pre-accession minority protection standard needs to be devised, which would replace the two contradictory standards employed during the fifth enlargement. Such a standard will be absolutely necessary, given the human rights and minority protection record of the present day candidate countries and those states hoping to submit membership applications in the future. Only when both internal and external standards are clearly articulated will it be possible to talk about a developed EU system of minority protection standards. At present, the European Union is only making the first tiny steps in this direction.